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JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1933.

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Yadao v. Namdeo, (1921) L.R. 48 I.A. 513=I.L.R. 49 C. 1=42 M.L.J. 219 (P.C.) 35, 39, 40, 41, 43, 45, 46, 143

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Yangtze Insurance Association v. Lukmanjee, (1918) A.C. 585 .. 137

Yashvantrav v. Kashibai, (1887) I.L.R. 12 Bom. 26 2

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recover from the respondent the zemindari of Chinnakimedi situated in the Ganjam District. The plaintiff claimed to be the son of Brojo Kishore Deo, who was at one time a zemindar of Chinnakimedi, by his wife Jhora. The defendant denied that Jhora was married to Brojo Kishore Deo, or that the plaintiff was the son of Brojo Kishore Deo. The Trial Judge [illegible]

[illegible]

[illegible]

In 1868, [illegible]

[illegible]

Nandamani Deo
(Plaintiff-appellant)

Purushottama Deo
(d. 1915)

Kunj Behari Deo
(defendant, d. 1926)
= Suseela (legal representative).

Before his death in 1868, Adikonda Deo gave to his widow, Kundanamala, a written authority to adopt a son to him. On the death of Adikonda, his brother, Raghunatha Deo, took

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possession of the zemindari. In 1870, Kundanamala, acting on the authority, adopted Brojo Kishore Deo as a son to her husband. Brojo Kishore Deo was one of the two sons of Lakshimanarayana Deo, who was then the zemindar of Peddakimedi. The other son was Krupamaya Deo, who succeeded to the zemindari of Peddakimedi on the death of Lakshimanarayana Deo. Shortly after his adoption, Brojo Kishore Deo instituted a suit to recover the zemindari of Chinnakimedi from Raghunatha Deo, and the suit was decided in his favour upon the advice of the Board in 1876[1]. Brojo Kishore Deo was then a minor, and the estate was managed by the Court of Wards. The Court of Wards appointed a guardian of his person, and he was sent for his education to the Raj Kumar Institute at Parlakimedi. Brojo Kishore Deo completed the age of 21 years in June, 1890, and the estate was handed over to him by the Court of Wards in that month. It is the plaintiff's case that Brojo Kishore Deo was married to Jhora in 1888 in the palace at Padaran, that Jhora lived after the marriage in the palace, and that Brojo Kishore Deo had four children by her, all of whom were born in the palace. Of these four children the eldest was a daughter born in 1889 or 1890, and the youngest was the plaintiff who was born on the 4th September, 1901. Two other sons, who were both born before the plaintiff, died in infancy.

On the 9th May, 1890, Brojo Kishore Deo married Ratnamala, who is still alive, and she was admittedly the Patta Mahadevi, that is, the senior Ranee or queen. Kundanamala was her aunt, and she brought about the marriage. This marriage took place at Dharmapuri. Brojo Kishore Deo had no children by Ratnamala.

It would appear from the books of account of the estate kept by the Court of Wards that about Rs. 15,000 was spent on the occasion of the marriage of Ratnamala. There is no entry in those books to show that any money was spent by the Court of Wards on any marriage with Jhora.

Ratnamala resided in a spacious building attached to the palace and communicating with it. Jhora resided in a building equally spacious adjoining that of Ratnamala, and also communicating with the palace.

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1. See *Raghunada Deo* v. *Brozo Kishoro Patta Deo*, (1876) L. R. 3 I. A. 154: I. L. R. 1 M. 69 (P. C.).—K. J. R.

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Shortly after Brojo Kishore Deo obtained possession of the estate, he granted a village called Chodameri as jaghir to Jhora. In 1893, he made a similar grant to her of another village called Narasingagodo. On the 5th July, 1894, he executed a *kocheri potro*, whereby he confirmed the grant of Chodameri, and substituted Gongapur for Narasingagodo at the request of Jhora. [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Brojo Kishore Deo died on the 3rd September, 1906, leaving him surviving Ratnamala, Jhora, his son the plaintiff, and his daughter. The plaintiff was then of the age of about five years.

It was not disputed that Brojo Kishore Deo and Jhora lived together in the palace at Pudamari from 1890 to 1906 when Brojo Kishore Deo died, and that the first birthday anniversary of the plaintiff was celebrated on a scale quite unusual in the case of an illegitimate son. Nor was it disputed that Brojo

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Kishore Deo treated Jhora as his wife and the plaintiff as his son. The only question is whether Brojo Kishore Deo and Jhora lived together all these years on the footing of marriage or of concubinage.

On the 7th September, 1906, Vaishna Deo made an application to the Collector of Ganjam to have his name registered as zemindar. In the application he stated that Brojo Kishore Deo had left no legitimate male issue, that he had left only an illegitimate son, and that he as his undivided cousin was entitled to succeed to the estate.

Vaishna Deo died within a fortnight after his application, and on his death his son Purushottama Deo applied to the Collector to have his name entered as proprietor of the zemindari. At this stage Ratnamala appeared on the scene and on the 5th December, 1906, she presented the authority to adopt alleged to have been given to her by Brojo Kishore Deo for registration under the Indian Registration Act. This was followed by an agreement on the 27th January, 1907 between Purushottama Deo and Ratnamala, whereby in consideration of Purushottama Deo granting two villages to Ratnamala she agreed not to adopt a son without his consent. On the same day another document was executed between Purushottama Deo and Krupamaya Deo, the natural brother of Brojo Kishore Deo, who had then succeeded to the zemindari of Peddakimedi. By that document Purushottama Deo agreed to pay Rs. 70,000 to Krupamaya Deo for bringing about the above settlement between him and Ratnamala and Krupamaya Deo on his part agreed not to give any of his sons in adoption to Ratnamala. On the 30th January, 1907, Ratnamala withdrew the authority to adopt from the office of the Sub-Registrar. On the 2nd April, 1907, the name of Purushottama Deo was entered by the Collector of Ganjam as proprietor of the estate.

Meantime, in December, 1907, Kundanamala, the widow of Adikonda Deo, purported to make a second adoption to her husband under the terms of the authority under which she had adopted Brojo Kishore Deo, by adopting a boy, Madana Mohana. The latter subsequently brought a suit against Purushottama Deo to recover the zemindari, but the suit was dismissed on the ground that the power to adopt had come to an end. This decision was eventually confirmed upon the advice of the Board

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[illegible]

in 1918[1]. In the plaint in that suit it was stated that Brojo Kishore Deo had died without leaving any legitimate issue.

Purushottama Deo died on the 24th October, 1915, while the suit against him was pending, and he was succeeded in the possession of the zemindari by his brother Kunja Behari Deo, the defendant in the present litigation.

[illegible]

[illegible] marriage, the marriage was not valid as the requisite ceremonies had not been performed. The paternity and age of the appellant were not admitted, and the genuineness of the *dattata* will-*namah* was denied.

1. See *Madana Mohana Deo* v. *Purushottama Deo*, (1918) L. R. 45 I. A. 156: I. L. R. 41 M. 855: 35 M. L. J. 138 (P. C.).—K. J. R.

2. See *Bheema Deo* v. *Behari Deo*, (1921) L. R. 48 I. A. 482: I. L. R. 44 M. 733; 41 M. L. J. 648 (P. C.).—K. J. R.

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A large mass of evidence, both oral and documentary, was adduced by both the sides before the Subordinate Judge. The plaintiff's mother died in 1922 before she could be examined as a witness. Ratnamala is still alive, but she was not called as a witness by either side. It is a striking circumstance that though the plaintiff appeared in the witness-box, the defendant, who was much older than the plaintiff, and who must have known a great deal of the relation between Brojo Kishore Deo and the plaintiff's mother, did not go into the witness-box. The defendant died in 1926 during the pendency of the appeal in the High Court, and his widow, Suseela Mala, was brought on record as his legal representative.

The plaintiff called evidence to show that his mother was the daughter of Chintamani Singh, a Kshatriya resident of Damanabhumi, and the sister of Kasinath Singh, who was admittedly a Kshatriya, and that her name was Jhora, and not Moti as alleged by the defendant. The principal witnesses who deposed to these facts were Artabandhu Singh her paternal uncle, Kasinath Singh, her brother, and Raja Kumar Pratapchandra, a distant relation of hers. The Subordinate Judge, it would appear, was considerably impressed with the evidence of Raja Kumar Pratapchandra, and of him he recorded the following opinion:—"I must say that there are no grounds for disbelieving this witness, an old gentleman and a retired deputy collector of the family of old Ghumsur zemindars of this district." These witnesses also deposed to the negotiations for marriage. Evidence was also led to show that Kundanamala approved of the match, that the usual Pattamuddi ceremony, a ceremony which precedes marriage, was performed at Damanabhumi; and that after a few days she was taken to Pudamari where the marriage with Brojo Kishore Deo was celebrated. It was not disputed that the ceremonies deposed to by the witnesses who spoke to the marriage were ceremonies that are usually performed at an ordinary marriage in the Brahma form.

The evidence on the part of the defendant was directed to show that the plaintiff's mother was not the daughter of Chintamani Singh, nor the sister of Kasinath Singh, but that she belonged to the barber caste and came from Pabamanabhapur. Several witnesses were also examined who deposed that she was a servant girl in the employ of a concubine of the plaintiff's natural father at Peddakimedi, and that it was at that place

that Brojo Kishore Deo first met her and became intimate with her. These witnesses also deposed that the eldest daughter of Brojo Kishore Deo was born, not at Pudamari, but at Peddakimedi, and that Brojo Kishore Deo did not take the plaintiff's mother to Pudamari until after his marriage with Ratnamala. They also stated that the name of the plaintiff's mother was not Jhora but Moti; that Jhora was a title conferred by a zamindar upon a favoured concubine, and that Brojo Kishore Deo conferred that title upon the plaintiff's mother two or three years after she remained at Pudamari, and that it was since then that she came to be called Jhora.

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[illegible]

The Subordinate Judge found that the plaintiff's mother was the daughter of Chintamoni Singh and the sister of Kasinath Singh; that she was a Kshatriya by caste, and that Jhora, and not Moti, was her personal name. He also found that she was lawfully married to Brojo Kishore Deo and that the plaintiff was the offspring of that marriage. As to the [illegible] will [illegible] he held that it was genuine. In the result he passed a decree in favour of the plaintiff.

On appeal, the High Court reversed the decree of the Subordinate Judge and dismissed the plaintiff's suit. The appeal was heard by Kumaraswami Sastri and Reilly JJ., who delivered separate but concurring judgments. The learned Judges examined the evidence of Kasinath Singh, [illegible] Singh and Raja Kumar Pratap [illegible], and concurred in the findings of the Subordinate Judge as to the name, parentage and caste of the plaintiff's mother and as to the place from which she came. But strange to say, while the learned Judges accepted the evidence of these witnesses on this, which was an essential part of the plaintiff's case, they rejected their evidence as to the treaty for marriage. Kumaraswami Sastri J. considered that it was improbable that there were any negotiations for the marriage. Reilly J. on the other hand was of opinion that there were some negotiations, but that they were negotiations not for a marriage but for giving the plaintiff's mother in concubinage to Brojo Kishore Deo. As to this their Lordships may at once say that there is nothing in the facts of the case to suggest such a view, and that it is so highly improbable that it cannot be accepted. The learned Judges also discredited the testimony of witnesses of marriage. This they did, not on the ground of any inherent defects in their evidence, but on the

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supposed improbabilities of the case. In the result they held that the alleged marriage was not proved.

The first question for their Lordships' consideration is, whether there are any facts to justify the rejection of the testimony of the witnesses who deposed to the treaty for marriage and the marriage ceremony. The learned Judges considered that there were three such facts.

Of these facts the first was that neither the natural father of Brojo Kishore Deo nor any of his relations were consulted by Kundanamala in the matter of the selection of the bride and that none of them was present at the marriage. As to this it is sufficient to say that it was admitted by the defendant's own witnesses, [illegible] and [illegible], that none of them was consulted in the matter of the selection even of Ratnamala and [illegible] the marriage of [illegible] Kishore [illegible].

[illegible] High Court [illegible] marriage with [illegible] admitted by the witnesses for the plaintiff, but [illegible] by the [illegible] the marriage [illegible] at [illegible] Kundanamala [illegible] Brojo Kishore Deo [illegible] agree to it and [illegible] removed and [illegible]. The learned Judges [illegible] Court considered that this was an improbable story. Their Lordships, however, see no reason to differ from the Trial Judge.

Lastly, the learned Judges thought that the Court of Wards was not cognizant of the marriage, and considered that a very significant circumstance. They said that if the Court of Wards had been aware of Brojo Kishore Deo's marriage with Jhora, it would not have sanctioned a second marriage with Ratnamala while he was still a minor, nor would it have sanctioned the expenditure of such a large sum of money as Rs. 15,000 on the occasion of such a marriage.

Their Lordships are unable to accede to this view. The powers of the Court of Wards in Madras are regulated by Act I of 1902. Under S. 23 of the Act, "the Court may make such orders and arrangements, as to it may seem fit, in respect

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of the . . . marriage—(*a*) of any ward whose person is for the time being under its superintendence." S. 34, cl. (*a*) prohibits a ward from transferring any property which is under the superintendence of the Court, and from entering into any contract involving him in pecuniary liability either personally or in respect of such property. "But," the section goes on to [illegible]

ing the plaintiff's mother in the documents marked X, II to VI, A, B, W and XV. As to this, the defendant's case was that "Jhora," besides being a proper name, signifies among the Oriyah zemindars the favoured concubine of a zemindar; that "Phool Mahadevi" is another word for "Jhora" in the sense of a concubine; that it was in that sense that those terms were used in the documents; and that, therefore, the plaintiff's

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mother was the concubine, and not the wife of Brojo Kishore Deo. On the other hand, the plaintiff insisted that neither "Jhora" nor "Phool Mahadevi" signifies a concubine, and that both these terms are synonyms for "Sanna Mahadevi," that is, a junior wife.

The term "Mahadevi" does not present any difficulty. It is clear from the evidence of the defendant's own witnesses, the Manager of the Court of Wards and the Zemindar of Dharakote, that "Mahadevi" signifies a married woman, and that it cannot be used in conjunction with "Jhora" in the sense of a concubine.

The expression "Phool Mahadevi" does not appear in any Oriyah dictionary. The Zemindar of Dharakote stated that he had never heard that word. The Manager of the Court of Wards said that he had heard it only once. The rest of the defendant's evidence in this connection is not reliable. In fact the defendant himself in one of the grounds of appeal to the High Court stated that "Phool Mahadevi" was an "unfamiliar designation" invented to conceal the fact that the plaintiff's mother was a concubine. Their Lordships are, therefore, unable to agree with the High Court that "Phool Mahadevi" signifies a concubine.

"Jhora" according to Oriyah dictionaries means a bunch of flowers. There is one dictionary, however, in which the word is also stated to mean "sanno Mahadevi", *popor* (popularly called) Jhora Devi. But there is no dictionary in which "Jhora" is stated to mean a concubine. The Subordinate Judge thought that "Jhora," in a secondary sense, is the equivalent of "Sanna Mahadevi," that is, a junior wife. The High Court differed from him, and considered that it means a concubine. Their Lordships are not satisfied that "Jhora" signifies a concubine. Assuming that it does, they are of opinion, for the reasons stated later, that it has not been proved that it is used in that sense in the documents mentioned above. These documents must now be considered.

Exhibit X.—As to this document both the Subordinate Judge and Kumaraswami Sastri, J., held that it was marked only for identification, and that it was not proved. Reilly, J., however, considered that it was proved. Their Lordships have no doubt that the document has not been proved.

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[illegible]

Exhibits II to VI.—These purport to be accounts of the household and other expenses of Brojo Kishore Deo. They contain several items mostly of a few annas "on account of Jhora's house". These accounts were put in in lump by the defendant's pleader in the course of the cross-examination of one of the witnesses for the plaintiff after he had identified the handwriting of Chhy Patnaik by whom it was stated they were written. Chhy Patnaik was then in the service of the defendant but was not examined as a witness. No evidence was led to show to whom Jhora in those entries referred or in what sense that word was used nor were the items put to any witness for the plaintiff in cross-examination. No inference therefore [illegible] can be drawn from these accounts.

Exhibits B, I, XI and W.—Exhibit B is the *[illegible]* dated the 5th July 1891 in respect of the jaghir granted by Brojo Kishore Deo to the plaintiff's mother. In that document the plaintiff's mother is described as "Sri Phool Mahadevi Sreemoti Deo Jhora". Ex. XI is the *[illegible]* will-*nama*, dated the 31st August 1900 also executed by Brojo Kishore Deo. In that document she is described as "Sri Maharajah's Phool Mahadevi Sreemoti Debi Jhora". She is also described in similar terms in Ex. XV which was a lease granted by her of part of her jaghir lands and in Ex. W which was a mortgage in her favour. Both these documents were executed after the death of Brojo Kishore Deo. Their Lordships think that there is nothing in any of these documents to show that Jhora is used in the secondary sense of a concubine. Phool Mahadevi, as already stated, does not signify a concubine. These documents therefore do not support the defendant's case. On the contrary they show that the plaintiff's mother was a married woman for admittedly the term "Mahadevi" could not be used except in connection with a married woman.

It will be convenient to consider here another point which was relied upon by the learned Judges of the High Court, and strongly urged on behalf of the defendant. It was this that no claim was put forward by the plaintiff's mother on behalf of the plaintiff for about thirteen years, and that she acquiesced in adverse claims made against the estate from time to time, and that these facts raised a strong presumption that the plaintiff's

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mother knew that she was not the wife of Brojo Kishore Deo and that the plaintiff was his illegitimate son. As to the plea of acquiescence their Lordships may observe that a minor is not bound by any acquiescence on the part of his guardian, though it may be a piece of evidence against him. How far it militates against him is a question dependent upon the facts of each case.

Brojo Kishore died on the 3rd September, 1906. Within four days after his death Vaishna Deo applied to the Collector to have his name registered as proprietor of the zemindari. He died within a few days after his application, and it was followed by a similar application by Purushottama Deo. Shortly after this Purushottama called together the leading men of Pudamari and adjured them to support his claim to the estate. About the same time some of his servants, under his instructions locked up almost all the doors of Jhora's house. In this state of things [illegible] to Kanjamaya Deo the [illegible] him, the [illegible] Deo had his own ends to serve. He assured her that he would look after the plaintiff's interest and advised her not to show the document to the Collector. What [illegible] after the death of Brojo Kishore Deo and now [illegible] Purushottama Deo has already been stated. He was [illegible] one of the learned Judges [illegible] playing a double game [illegible] assuring the plaintiff's mother for help and at the same time betraying her interest". Jhora however confided implicitly in him and it is not improbable that following his advice she made no mention of the document to the Collector when he saw her and remained inactive.

It would appear that Purushottama Deo allowed Jhora to enjoy without interruption the rents and profits of the two villages granted to her as jaghir by Brojo Kishore Deo for some years. In 1913, however, he denied her right to them, and Jhora had to institute a suit against him to establish her right to them. She lost in the first Court on the ground that the document on which she sued was not registered. She appealed, and the suit was compromised, she retaining one village and giving up her claim to the other.

Paragraph 4 of the plaint in that suit is in these terms: " The plaintiff is the Jhora wife of the late Sri Brojo Kishore Deo, Zemindar of Chinnakimedi. The late Brojo Kishore Deo

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accepted her in the *gandharva* form and treated her as such with all rights and ceremonies due to her since 1888." Purushottama Deo filed a written statement. In paragraph 1 he stated: "The allegations in paragraph 4 of the plaint are not true. Plaintiff was a mere concubine of the late Sri Brojo Deo, and as such enjoyed no special rights or ceremonies." As [illegible]

[illegible]

[illegible] that the marriage with him took place in the ordinary form, and that she was his "Jhora wife" because her marriage took place before the *Pattabhishekam* ceremony. It cannot, therefore, be said that the delay in bringing the present suit was due to any consciousness on her part that she was not married to Brojo Kishore Deo. It must have been due to other causes. What those causes were cannot now be definitely ascertained, for she died before she could be

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examined as a witness. But the circumstances of the case suggest several sufficient reasons. In the first place, she was, as their Lordships have already said, the victim of Krupamaya Deo's machinations. Then there was the difficulty of financing an expensive litigation up to the final tribunal of appeal, for the plaintiff had to sell the lands before he could sue. Lastly, she ran the risk, if she brought such a suit as the present, of being turned out of the palace with her infant children.

The last contention on behalf of the defendant was based on three documents which, it was contended, showed that the plaintiff was the illegitimate son of Brojo Kishore Deo.

The first of these documents is the authority to adopt, dated the 14th August, 1906, alleged to have been given by Brojo Kishore Deo to Ratnamala. In that document it has been stated that Brojo Kishore Deo had not till then been blessed with a son suggesting that the plaintiff was not of legitimate birth. Both the Courts in India held that the document was not proved. Their Lordships see no reason to differ from that finding.

The second document is the deed of sale, dated the 23rd July, 1906, in respect of lands purchased by Brojo Kishore Deo in the name of the plaintiff "represented by his mother and guardian Srimathi Devi Jhora Garu". The learned Judges of the High Court considered that the purchase was made by Brojo Kishore Deo as a provision for the plaintiff, which he would not have done had the plaintiff been of legitimate birth. But the transaction was *prima facie* benami, and there is no evidence to show that it was intended as a provision for the plaintiff. Benami purchases in the names even of legitimate sons are not uncommon in India. Their Lordships do not think that this document in itself supports an inference of illegitimacy.

The last document is the *dattata* will-*namah*, dated the 31st August, 1906. It was executed by Brojo Kishore Deo three days before his death. It is headed by a statement that it had been executed by him and Ratnamala, but the document was not executed by her. The following is a translation of the document as given in the judgment of Kumaraswami Sastri, J., and accepted by both the sides:—

"*Dattata* will-*namah* executed on the 31st day of August, 1906, corresponding to the 16th day of Simho of Onko 37, by the following two persons, namely, Sir Beeradhi Beero Pratapa Sri Brojo Kishore Ananga Bhima Deo Kesari Sri Sri Maharaja and Sri Sri Ratnamala Patta Mahadevi. I, Sri Sri

Sri Brojo Kishore Maharajah, have been suffering from bodily illness for about the last 7 months. I have taken medicine from several people. Till this day I have not found any relief. We have no issue (born) jointly to both of us (out of our union) to succeed to our Taluk. Be it now known to all hereby that we, Sri Sri Sri Brojo Kishore Deo Maharajah and Sri Sri Ratnamala Patta Mahadevi, we two have lawfully consented to adopt Sri Nandamani Deo who is about 5 years of age and who was born in the family in the middle of our Antahpuram (harem) to my, (i. e.), Sri Maharajah's Phool Mahadevi, Srimoti Debi Jhora, and to me, Sri Sircar, and to his look- [illegible]

[illegible]

[illegible] while he was on his death-bed. It is confused and impossible to construe as having any legal effect. It may mean either that Brojo Kishore Deo was persuading Ratnamala to be reconciled with the plaintiff's mother and to treat the plaintiff as her own son, or he was importuning her to take in adoption his illegitimate son by a concubine. The learned Judges of the High Court understood it in the latter sense. The plaintiff who relied

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upon it, did not so understand it, nor did the defendant who insisted throughout that it was fabricated Their Lordships find it difficult to believe that Brojo Kishore Deo should have on his death-bed contemplated an adoption of a son of a concubine. Their Lordships are, therefore, unable to agree with the High Court, that the document is evidence of the illegitimacy of the plaintiff.

In the result, their Lordships are of opinion that the marriage of Jhora with Brojo Kishore Deo is established, that Jhora was his junior wife, and that the plaintiff as his legitimate son is entitled to succeed to the estate.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated the 30th March 1928, should be set aside, and the decree of the Subordinate Judge, dated the 20th December, 1922, restored. The respondent must pay the costs of the appellant in the High Court and before this Board.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondent: *Douglas, Grant & Dold.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Rajah Sir S. R. M. Annamalai Chettiar by his authorised agent P. Dhanapala Chettiar made a party appellant *vide* Order dated 17th July, 1930, in C. M. Ps. Nos. 2240 and 2241 of 1930, respectively .. *Appellant* in both (nil)*

v.

Sri Rama Narasimhulu Naidu and another .. *Respondents (Plaintiffs).*

Annamalai Chettiar *v.* Narasimhulu Naidu.

Madras Estates Land Act (I of 1908), S. 13 (3)—"Improvement at his sole expense"—Well sunk by ryot in patta land.

If a well is sunk in poramboke land, the landholder by handing over that site for sinking the well can be regarded as having contributed to the cost of the improvement and S. 13, cl. (3) of the Madras Estates Land Act would not apply. But where the well is sunk by the ryot on his patta land without the assistance of the landholder, the prospective loss of rent on the area of the site covered by the well cannot be deemed to be a contribution by

*Second Appeals Nos. 727 and 728 of 1930. 20th October, 1932.

the landholder towards the cost for the reason that he is, nevertheless, free to charge rent even on the area of the site of the well at the prevailing rate.

Annamalai Chettiar *v.* Nara-simhulu Naidu.

Appeals against the decrees of the District Court of Chittoor in A. S. Nos. 133 and 134 of 1928 preferred against the decrees of the Court of the Special Deputy Collector of Chandragiri Division in S. S. Nos. 813 and 812 of 1927, respectively.

B. Somayya and *V. Satyanarayana* for appellant.

S. A. Seshadri for respondents.

The Court delivered the following

JUDGMENT.—These are connected second appeals arising out of two suits filed by two ryots against the landholder for grant of patta under S. 55 of the Madras Estates Land Act for Fasli 1336.

The main point argued is whether the plaintiffs have effected any improvements at their sole expense within the meaning of S. 13, cl. (3) of the said Act in some of the dry lands in question and whether the landholder can charge rent according to crop-war rates and second crop rates prevailing in the village, although crops of a superior nature such as garden and wet crops raised on such dry lands, were the result of those improvements. According to the findings of the Lower Courts, it is clear that these lands are classified as dry, that though they were originally poramboke they have become patta lands of the plaintiffs, that the improvements effected by the ryots-plaintiffs consist of wells sunk in their patta lands at their own cost subsequent to the passing of the Estates Land Act and that before the sinking of these wells only ordinary dry crops could be raised on these lands. It is admitted that the usage in this village is to levy crop-war rates of rent which depend upon the nature of the crop raised and the extent of land actually cultivated. As would appear from the patta-filed (for instance cl. (10) of the patta Ex. C) no rent would be charged on lands left waste or uncultivated unless the non-cultivation is due to the neglect of the ryot.

In the light of these facts, the question at issue has to be determined. S. 13, cl. (3) declares, that notwithstanding any usage or contract to the contrary, a ryot shall not by reason of making an improvement at his sole expense, become liable to pay a higher rate of rent on account of any increase of production or of any change in the nature of the crop raised as a consequence of such improvement. In the present case, there

Annamalai Chettiar v. Narasimhulu Naidu.

is no doubt that the wells sunk by the ryots in their patta lands for the supply of water for agricultural purposes would be an improvement within the meaning of S. 3 (4) of the Act. These wells are not shown to prejudicially affect any other land of the landholder. Nor is it the case of the defendant that any money was contributed by him for the expenses of sinking these wells.

It is argued by the learned Advocate for the appellant, that the landholder may be deemed to have contributed something towards the improvement by reason of the fact that he loses the chance of recovering any rent on the area of the site covered by the wells. In support of this contention reliance is placed on the decision in [illegible][1]. It is strenuously contended on the respondent's side that that decision has no application to the present case. In that case the point was whether in view of the facts disclosed in the evidence the Zamindar was entitled to charge enhanced rates for crops grown with the aid of well water. S. 13 (3) of the Estates Land Act was held to be inapplicable to that case as the improvements were effected prior to the Act. But the question turned upon the validity of a contract to pay enhanced rates. In order to see whether there was consideration for the contract [illegible]. It was shown that the wells were dug in the poramboke land entered in the accounts as poramboke and that the area covered by the wells was rendered uncultivable. The land in which the wells were dug was not the property of the ryots but belonged to the Zamindar. That is why Napier, J., has observed thus:

> "By handing over that area to the ryots for the construction of wells he has in our opinion contributed to the cost of the wells and such contribution is good consideration for the contract set up by him."

For the purpose of applying cl. (3) of S. 13, the important point is whether the wells in question were sunk at the sole expense of the ryots. In order to dig a well, the first requisite is land which must serve as the site for the well. If the wells in question were dug in poramboke land, the landholder by handing over that site for sinking the wells can be regarded as having contributed towards the cost of these improvements and the case would be taken out of the operation of the said section. The prospective loss of rent on the area of the site covered by

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1. (1914) 28 M. L. J. 136.

Annamalai Chettiar *v.* Narasimhulu Naidu.

the wells cannot by any stretch of the observations in *Lodd Govindoss* v. *Chinnappa Naidu*[1] be deemed to be a contribution by the landholder towards the cost of sinking the wells, and for this reason, it cannot be held, that the improvements are not those made at the sole expense of the ryots, within the meaning of S. 13 (3) of the Act. [illegible]

[illegible]

[illegible] accordingly, until the ryots resort to an appropriate remedy and get the classification changed or assessment reduced.

In the result, these appeals and the memoranda of objections are dismissed with costs.

S. R. *Appeals dismissed.*

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1. (1914) 28 M. L. J. 136.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Gurusami Goundan .. *Appellant** (*Petitioner*)

v.

Sivanmalai Goundan and others ... *Respondents* (*Respondents*).

Gurusami Goundan *v.* Sivanmalai Goundan.

Civil Procedure Code (V of 1908), O. 21, Rr. 2 and 15—Decree—Uncertified adjustment—Assignment of decree in favour of third person by one of the decree-holders—Whether plea of adjustment permissible—Whether Court given wider discretion in case more persons than one have the decree in their favour.

An agreement, whether it [illegible] between judgment-debtor and decree-holder or some one else, would be precluded [illegible] pleaded by the judgment-debtor as an adjustment [illegible] has not been certified [illegible] Court as required [illegible] O. 21, R. 2 of the Civil Procedure Code.

Where, as in the present case, [illegible] decree-holder and the [illegible] persons [illegible] the decree [illegible] the Court [illegible] The discretion under O. 21, R. 15 [illegible] the Court [illegible] the judgment-debtor could not plead an uncertified [illegible] But if the other decree-holders say, as they do in this case, that the application of their fellow decree-holder is [illegible] nothing in O. 21, R. 2 [illegible]

Appeal against the order of the Court of the Subordinate Judge of Coimbatore dated 28th March 1929 and made in E. P. R. No. 303 of 1928 in O. S. No. [illegible] of 1921.

[illegible] *Balasundaram* for appellant.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for respondents.

The judgment of the Court was delivered by

Jackson, J.

Jackson, J.—Three persons, Sivanmalai, Chidambara and Amarapathi Goundan, obtained a mortgage decree against one Ammani Ammal. She sold lands to Palayakottai Pattakkarar, and part of the purchase price was paid by him in satisfaction of the decree. Sivanmalai and Chidambara were satisfied, and state in their affidavit that nothing more was due. The third decree-holder Amarapathi however assigned his right to one Gurusami Goundan and he applied to execute the decree by sale of the hypotheca after recognising his assignment.

The Subordinate Judge has found these facts to be true, and we see no reason not to accept his finding. As he says, Amarapathi Goundan got a final decree fraudulently behind the

*C. M. A. No. 477 of 1929. 12th September, 1932.

Gurusami Goundan v. Sivanmalai Goundan.

Jackson, J.

back of the judgment-debtor and other decree-holders. Accordingly he dismissed the petition and Gurusami Goundan appeals.

The appellant contends that Ammani Ammal has no right to plead against his application an uncertified adjustment. We entirely agree. It makes no difference that Gurusami Goundan is not an original decree-holder but his assignee [illegible] because [illegible] been clearly held by a Full Bench that in such circumstances O. 21, R. 2 is still operative. [illegible][1]. Nor in our opinion does it make any difference that Ammani Ammal is not pleading a direct [illegible] through her vendee [illegible] has been [illegible] Pattar[2] [illegible] Judge held [illegible] the transaction subsequently pleaded [illegible] adjustment [illegible] some person other than the decree-holder [illegible] O. 21 [illegible] S. 258 Civil Procedure Code [illegible] judgment-debtor [illegible] of the judgment-creditor [illegible] subsequent assignee of the decree [illegible] is not debarred by O. 21, R. 2 from pleading [illegible] uncertified adjustment.

[illegible] [3] [illegible] dissented from by the other member Mr. Justice Abdur Rahim who held that by the plain language of O. 21, R. 2 the judgment-debtor would be precluded from pleading any such adjustment. One of us had occasion to consider the passage in [illegible] Pattar[2] in [illegible] Krishna [illegible][4] and held [illegible] as soon as [illegible] no matter whether it be between judgment-debtor and decree-holder or some one else [illegible] pleaded [illegible] the mischief of O. 21, R. 2 is attracted [illegible] opinion we [illegible] and unhesitatingly endorse the view of Abdur Rahim, J., in *Ponnusami Nadar* v. *Letchmanan Chettiar*[3]. Therefore Ammani Ammal in this case cannot plead an adjustment which she has not troubled to certify under O. 21, R. 2.

1. (1932) 62 M. L. J. 562 (F. B.).
2. (1895) I.L.R. 19 Mad. 230: 5 M. L. J. 218.
3. (1911) I. L. R. 35 Mad. 659: 22 M. L. J. 170.
4. A. I. R. 1930 Mad. 673.

Gurusami Goundan *v.* Sivaunmalai Goundan.

Jackson, J.

But the present case is not entirely between the assignee decree-holder and the judgment-debtor. There are the other two persons in whose favour the decree has been jointly passed, and in such circumstances the Court is allowed a large discretion under O. 21, R. 15. For one decree-holder to be doing the execution on behalf of all is a curious business which may well put the Court upon its guard; and the Code very sensibly warns the Court to find sufficient cause for allowing the decree to be executed. Under this provision there is no objection to the Court hearing what the other decree-holders have to say, though no doubt the judgment-debtor even under this section could not plead an [illegible] adjustment. [illegible] the other decree-holders say as they say in their present affidavit (10th November 1928) that the application of their fellow decree-holder is [illegible] and nothing in O. 21, R. [illegible] or any other provision of law precludes the Court from refusing execution [illegible] [illegible] properly [illegible].

The appeal is dismissed with costs [illegible] respondents 1 to [illegible]

[illegible] *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice [illegible] and Mr. Justice [illegible]

The Secretary of State for India in Council represented by the Collector of Nilgiris .. *Petitioner*

v.

A. R. Lakhanna .. *Respondent (Pltf.).*

The Secretary of State for India in Council *v.* Lakhanna.

Court Fees Act (VII of 1870 as amended by Madras Act V of 1922), S. 7 (iv) (c), (iv-A) and Sch. II, Arts. 17-A and 17-B—Suit for partition—Allegation as to prior severance in status—Suit for cancellation of decree—Declaration regarding mortgage—Court-fee payable—Plaint allegations as basis for determining court-fee.

A suit for partition of immoveable properties of the family by a Hindu who alleges that there has been a prior division in status and that he is in possession of the properties as a co-tenant with the other members is governed by Art 17-B of Sch II of the Court Fees Act.

When a person sues for a declaration that a previous decree obtained against him is not binding on him, the suit is in substance one for cancellation of the previous decree and court-fee is payable in such a case under S. 7 (iv-A) of the Court Fees Act as amended in Madras, and not under S. 7 (iv) (c).

Venkataswa Rao v. *Satyanarayanamurthy*, (1932) 63 M. L. J. 764 and *Doraiswami* v. *Thangavelu*, A. I. R. 1929 Mad. 668, relied on.

*C. R. P. No. 482 of 1932. 7th September, 1932.

The Secretary of State for India in Council *v.* Lakhanna.

Where a Hindu son alleged that a certain mortgage executed by his father's agent was not binding on him and prayed that he may be granted a partition free of that mortgage,

Held, that the prayer was in effect for a declaration that the mortgage was not binding on the plaintiff's share and that court-fee was payable under Art. 17-A (1) of Sch. II of the Court Fees Act.

For the purpose of ascertaining the court-fee payable one must have regard to the allegations in the plaint and it is not the function of the C [illegible]

[illegible]

Subba Rao, J.

Pleader has raised three points.

The first question is the only one dealt with by the Lower Court in its judgment, and we are satisfied that its decision is correct. For the purpose of ascertaining the court-fee payable, one must have regard to the allegations in the plaint and it is not the function of the Court to ask itself whether those allegations are true or probable. The learned Judge points out that the plaintiff has asserted that there has been a division in status

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Venkatasubba Rao, J.

and the court-fee has been paid on the basis of that assertion under Art. 17-B of Sch. II of the Court Fees Act. We agree with the view that the proper court-fee has been paid.

Point 2.—In the plaint it is alleged that the 6th defendant obtained a decree ***inter alia*** against the plaintiff on the basis of a mortgage executed by the plaintiff's father, and the plaintiff prays for a declaration that that decree is not binding on his share of the property. It has been held in *Venkatasiva Rao* v. *Satyanarayanamurthy*1 and *Doraiswami* v. *Thangavelu*2 that the section that applies in such a case is S. 7 (*iv-A*) which runs thus

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit, and such value shall be deemed to be, if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed, if a part of the [illegible] value of the property."

The question arose in those cases whether the section that is applicable is S. 7 (*iv-A*) or S. 7 (*iv*) (*c*) and it was pointed out that what the Court must look to is the substance of the relief claimed and not the mere form of the plaint. The plaintiff prays in this case that it may be *declared* that the decree to which we have referred is not binding on his share. That is to say, it is in form a *declaratory relief* that he prays for; but in truth the plaintiff's request amounts to a prayer that the part of the decree which affects him may be *cancelled*. Though the relief has been so worded as to bring the case within S. 7 (*iv*) (*c*) which runs thus,

"to obtain a declaratory decree or order, where consequential relief is prayed",

we must hold on the authority of the cases to which we have adverted, that the section applicable is S. 7 (*iv-A*).

Point 3.—The plaintiff complains also that a certain mortgage executed by his father's agent in favour of the 7th defendant is not binding on him and prays that he may be granted a partition free of that mortgage. The prayer is in effect for a declaration that the mortgage is not binding on the plaintiff's share. We agree with the learned Government Pleader that Art. 17-A (1) of Sch. II (*i. e.*, the one relating to the obtaining

1. (1932) 63 M. L. J. 764. 2. A. I. R. 1929 Mad. 668.

of a declaratory decree where no consequential relief is prayed) applies.

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The Lower Court will take suitable action in regard to the collection of the court-fee in accordance with this judgment.

B. V. V. *Order made.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Canada.]

PRESENT:—[illegible] LORD MACMILLAN, LORD WRIGHT and SIR GEORGE LOWNDES.

Paul [illegible]

[illegible]

[illegible] Railway Company [illegible]

[illegible]

Appeal No. 27 of 1931 from a decree and judgment of the Supreme Court of Canada.

[illegible] for appellant.

[illegible] K.C. for respondents.

13th October 1932. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The appellant in this case was plaintiff in the action. He is a farmer living at Rossdale, about 15 miles north of the City of Winnipeg, in the Province of Manitoba, and his claim is that he suffered damage by the respondents' negligence and breach of duty. The respondents are a Company incorporated by Special Act of the Legislature of

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*P. C. Appeal No. 27 of 1931. 13th October, 1932.

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Manitoba, Statutes of Manitoba, 1900, c. 78, as amended by Statutes of Manitoba, 1904, c. 90, and as affected by Manitoba Railway Act of 1913, c. 168. The respondents' line ran from Winnipeg northwards to Selkirk, about 19 miles in distance, and was laid on the west side of the highway between these points and actually along the highway, but in a distinct portion, separated by a wide ditch from the gravelled roadway ordinarily used by vehicles and foot passengers: the ditch and railway were traversed at intervals by crossings from the roadway to the places to the west. Power so to lay the track along the highway was given by the Act of 1900 and in particular S. 13 of that Act provided (though in fact this provision was not observed in the [illegible]) that as far as practicable the railway should be laid as nearly flush as possible with the street or highway along which it is laid so as to offer the least possible impediment to the ordinary traffic of the streets and highways consistent with the proper working of the railway. S. 24 provided for the making of agreements by the respondents with the rural municipalities through which the railway passed. Such agreements were [illegible] and [illegible] by the Act of 1904. These agreements [illegible] in details, granted to the respondents on [illegible] conditions the privilege or franchise of [illegible] along and on the highway expressly provided *inter alia* that all cars and trains should have the right of way on the tracks and highways and any vehicles horsemen or foot passengers should, on the approach of any car give the car right of way. The agreements also contained a term that all cars running after dark should be provided with signal lights to be conspicuously displayed thereon. With these agreements there is to be considered S. 38 of the Railway Act, which provides that no person other than those connected with or employed by the railway company, shall walk along the track except where the same is laid across or along a highway, and not even then if the track be laid on a separate and distinct part of such highway, and it be so expressed or understood between the company and the municipal council in whose territory such highway is comprised. So far from there being in the present case any such matter expressed or understood (whatever may be the meaning of that latter term), the language of the agreements just quoted shows that the respondents were to have no exclu-

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sive user of their track along the highway, but were merely to have a preferential right of way on the approach of a car. S. 40 of the same Act provides that every railway company shall at all times provide adequate equipment and motive power for the efficient working of the railway, subject to the directions of the Public Utility Commissioner, whose functions do not appear to have been invoked in [illegible]

[illegible]

[illegible]

a superintendent or barn foreman, who attended to matters of equipment of cars, including headlights, but he went off duty at 6 P. M.: the light had been giving trouble on the way up from Winnipeg, and on arrival at Selkirk about 6-20 P.M. McLeod tried to put it right by changing the carbon, but there was no one to help him save a night watchman, who had no expert knowledge or skill. He accordingly started on the return

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journey in order to keep schedule time, but the light was so bad that he stopped twice before the accident to examine it. The respondents' evidence was that the light was not only of standard make, used in 90 per cent. of the cars in North America, but had been tested shortly before and after the accident and found in order.

The appellant, having commenced an action, alleged in his particulars of negligence that the respondents were negligent in the following respects:—

(a) In proceeding at a reckless and dangerous rate of speed, and in failing to maintain a careful and proper lookout on the car.

(b) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop.

(c) In not keeping the car properly equipped with sufficient and adequate brakes and in failing to apply the brakes and slow down the car in time to avoid a collision.

The case was tried before Curran, J., who notwithstanding the insistence of Counsel for the appellant, refused to submit to the jury any question whether the accident was due to the excessive speed having regard to the defects in the headlight, at which the car was driven.

The learned Judge submitted questions and received answers from the jury as follows:—

"Q. No. 1. Were the defendants guilty of negligence?—A. Yes.

"Q. No. 2. If so, in what did this negligence consist?—A. Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident.

"Q. No. 3. If the defendants were negligent was the injury to the plaintiff caused by their negligence?—A. Yes.

"Q. No. 4. Was the plaintiff guilty of contributory negligence?—A. No.

"Q. No. 5. If so, in what does such negligence consist?—A. None.

"Q. No 6. Might the defendants' servants after the position of the plaintiff became apparent, by the exercise of reasonable care, have prevented the accident?—A. No, none from evidence submitted. The motorman did all in his power to avoid the accident.

"Q. No. 7. At what sum do you assess the plaintiff's damages?—A. Special $354·25. General damages $2,000·00."

The answer to Question 2, not being a finding of any of the acts of negligence alleged, the jury, after being asked to reconsider their answer to that question, returned the following amended answer:—

"Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was

not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident."

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On these findings the learned Judge, on the 27th May, 1927, entered judgment for the appellant for $2,354·25 and costs. The respondents appealed to the Court of Appeal for Manitoba, who dismissed the appeal. The respondents then appealed to the Supreme Court of Canada, who, on the 5th February, 1929, allowed the appeal by a majority consisting of Rinfret, Newcombe and Smith JJ. (Anglin C.J. and Lamont J. dissenting) and ordered judgment to be entered for the respondents and refused a new trial to the appellant. From that judgment this appeal to His Majesty in Council is brought by special leave.

Their Lordships are of opinion that on any view the Supreme Court ought to have ordered a new trial so as to put to the jury the question whether the accident was not due to the negligence of the respondents by their motorman in driving at an excessive speed having regard to his knowledge that the headlight was inadequate—that is, at an excessive speed in view of all the circumstances. But this need not be further considered for reasons which will appear hereafter.

It is in the discretion of a Trial Judge to ask a jury to give a general verdict or require them to answer specific questions. But the language of a jury in explaining the reason for their verdict is not to be construed too narrowly. Their final answer to Question 2 may fairly be taken to mean that according to their finding the headlight on the journey in question was not functioning properly and there was negligence on the part of respondents or their servants in proceeding or allowing the car to proceed with a headlight so defective that if there was an object on the track the driver could not see it in time to avoid it. They must also have thought that there ought to have been at Selkirk expert men available who could deal with emergency repairs not only up to 6 P.M. but as long as the cars were running. If that latter element be excluded as not sufficiently pleaded, the other finding is not open to that objection.

It is convenient first to determine the legal position of the appellant when on the track at the time he was struck. The statutes referred to above gave the respondents the right to lay and operate the track—that is, to do something which, apart from the statutes, would have constituted a nuisance, because

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the track was laid on what was and remained part of the highway. Members of the public still continued entitled to use that part of the highway, though the respondents had a preferential right in the sense that, on the approach of a car, other users of the highway were to give the car "right of way". But that did not involve that the cars were to be driven in disregard of other users of that part of the highway: no doubt members of the travelling public would prefer to use the ordinary gravelled part of the highway; apart, however, from the special circumstances which placed the appellant, against his will, on the track, the same position might arise in other ways: a horse and buggy might be exposed to be caught by a car while passing over a level crossing, or a man might be driving sheep or cattle over a crossing or a motor car might break down on the track at the crossing or a motor car in winter going along the gravelled way might skid across the ditch and on to the track. To these instances may be added that of straying animals.

In their Lordships' judgment notwithstanding contentions to the contrary the respondents were under a legal duty by their servants to be on watch for the safety of people on the track and to equip the car with lights adequate at night to enable the driver to stop in time to avoid wayfarers: this affords a legal basis for the finding of the jury. No doubt on the part of the wayfarer there was also a reciprocal duty to take reasonable care to avoid the car and not to be guilty of contributory negligence. The jury here found the appellant was not guilty of contributory negligence. In effect, therefore the appellant was lawfully on the highway, and was neither a trespasser nor a mere licensee, nor was he there at his own risk. It is true that he was on the track much against his will, and it is also true that the circumstances under which he was there were abnormal and very unlikely to occur. But the jury must be taken to have been familiar with local conditions and to have weighed all the facts of the case when they found as they did that the respondents were negligent, and by that negligence caused the appellant injuries and damage. It cannot, in their Lordships' opinion, be said of that finding that it was without evidence or perverse: that is enough to dispose of the case unless there is some reason of law on which the verdict should be upset.

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[illegible]

It was objected on behalf of the respondents that there was no evidence on which the jury could reasonably find that the headlight was out of order, but their Lordships do not agree with this contention; nor do their Lordships think that it was essential for the appellant's case to establish some particular defect: in a case like this it was enough to show that the headlight in fact was [illegible]

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the judgment of the Trial Judge be restored, and that the respondents pay the appellant his costs of this appeal and his costs in the Courts below.

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1. (1902) A. C. 220.
2. (1915) A. C. 1110.

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Solicitors for appellant: *Raymond Oliver and Co.*

Solicitors for respondents: *Blake and Redden.*

S. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, SIR JOHN WALLIS AND SIR DINSHAH MULLA.

P. C.

Bhimabai
v
Gurunath-gouda

Bhimabai Kom Jivangouda Patil and another .. *Appellants**

v.

Gurunathgouda Khandappagouda Patil .. *Respondent*

Hindu Law (Bombay School) [illegible] *Consent of husband or of* [illegible] *extinction of coparcenary* [illegible]

In the Maharatta country [illegible] the authority of the Mitakshara is [illegible] expressly authorised by her husband, and whether he was [illegible] death separate or joint, adopt a son [illegible] him without [illegible] consent of his kinsmen or the surviving coparceners.

Ramji v. *Ghamau*, (1879) I. L. R. [illegible] v. *Ganabai*, (1925) I. L. R. 50 Bom. [illegible] (F. B.), [illegible]

Rakhmabai v. *Radhabai*, (18[illegible]) 5 B. [illegible]

Yadao v. *Namdeo*, (1921) L. R. [illegible] M. L. J. 219 (P. C.), applied.

The Ramnad Case, (1868) [illegible] v. *Sri Brozo Kishore*, (1876) L. R. 3 Ind. App. 15[illegible], I. L. R. [illegible] (P. C.) distinguished, being decisions under the Madras School of Hindu Law under which a widow, who [illegible] the express [illegible] cannot adopt a son to him without the consent of his kinsmen.

Obiter: An adoption by the widow of a coparcener [illegible] must be made during the subsistence of the coparcenary. If she adopts after the extinction of the coparcenary, *i.e.*, after the death of the last surviving coparcener, when the estate devolves by inheritance from him upon his heirs, the adoption is not valid. *Chandra* v. *Gojarabai*, (1890) I.L.R. 14 Bom. 463, referred to.

Judgment of the High Court, Bombay, (30 Bom. L. R. 859), reversed.

Appeal No. 51 of 1930 from a judgment and decree of the High Court, Bombay, dated the 28th February, 1928, which affirmed the judgment and decree of the Joint First Class Subordinate Judge of Dharwar, dated the 8th April, 1925.

The main question for consideration on the appeal was whether under the Hindu Law, in the Bombay Presidency, the widow of a deceased coparcener in a joint family has an inherent right to

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make a valid adoption, without either the authority of her husband, or the consent of the surviving coparceners of her husband. The High Court, Bombay, relying on *Ishwar Dadu* v. *Gajabai*[1], answered the question in the negative, remarking that the observations of the Board in *Yadao* v. *Namdeo*[2] on the subject were *obiter dicta*.

De Gruyther, K. C. (with *J. M. Parikh* and *A. G. Desai*) for appellants.—In Western India the widow's power of adoption, [illegible] than in Southern India, and [illegible] adopt a son to her deceased husband [illegible] and without the consent of his [illegible] The case is concluded by the decision of [illegible] their Lordships approved [illegible][3] and the contrary view [illegible][4] and in *Ishwar Dadu* [illegible] the Full Bench misapplied [illegible] decisions in *The Ramnad Case*[5] and in *Sri* [illegible][6], which were cases from Madras, [illegible] is requisite both where [illegible] time of his death [illegible] in *[illegible]* v. *Bala*[7], [illegible][8] [illegible] v. *Bapu*[9] [illegible]

[illegible] v. *[illegible]*[2] the Board [illegible] separation [illegible]

[illegible] that a widow whose husband was [illegible] validly adopt without [illegible] thereby overruling [illegible][4]

[illegible] passages in the Mayukha (Mandlik's [illegible] submitted that on these authorities [illegible] School, a widow may (in the [illegible] husband) validly adopt a son to [illegible] separate family without any consent [illegible]

[illegible] for [illegible][5] upon which much reliance is placed by the appellant, related to an adoption in a separated family.

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1. (1925) I. L. R. 50 Bom. 468 (F. B.).
2. (1921) L. R. 48 I. A. 513: I. L. R. 49 Cal. 1: 42 M. L. J. 219 (P. C.).
3. (1868) 5 Bom. H. C., A. C. 181. 4. (1879) I. L. R. 6 Bom. 498 (F.B.).
5. (1868) 12 M. I. A. 397.
6. (1876) L. R. 3 I. A. 154: I. L. R. 1 Mad. 69 (P. C.).
7. (1866) 7 Bom. H. C. Appx. i. 8. (1870) 7 Bom. H.C., A.C.J., 153.
9. (1890) I. L. R. 15 Bom. 110 at 131, 132.

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Where the adoption by the widow would have the effect of divesting an estate already vested in the coparceners, their consent must be obtained. *The Ramnad Case*[1], *Sri Raghunadha* v. *Sri Broso Kishore*[2] and *Rupchand* v. *Rakhmabai*[3] referred to

[Their Lordships remarked that the Mayuka does not discriminate between adoptions in a separated or undivided family.]

In *Rakhmabai* v. *Radhabai*[4] and other cases reported in the "Bombay High Court Reports" the learned Judges were not dealing with an adoption which would have the effect of divesting (without their consent) an estate vested in the coparceners, and it is submitted that the Mayuka does not support the validity of an adoption working such manifest injustice. *Payapa* v. *Appanna*[5], *Bachoo* v. *Mankorebai*[6] per Jenkins, C. J. [affirmed by the Privy Council in (1907) I. L. R. 31 Bom. 373 (P. C.)] and *Pratapsing Shivsing* v. *Agarsingji Raisingji*[7] referred to

In the alternative we submit that the adoption being made after the death of the sole surviving coparcener, Nilkanthagouda, when the coparcenary became extinct, was invalid. *Chandra* v. *Gojarabai*[8], [illegible][9] and *Shivbasappa* v. *Nilava*[10].

De Gruyther, K. C., replied.

4th November 1932. Their Lordships' judgment was delivered by

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SIR DINSHAH MULLA. — This is an appeal from the decree of the High Court of Judicature at Bombay dated the 28th February, 1928, which affirmed the decree of the Court of the Joint First Class Subordinate Judge of Dharwar dated the 8th April 1925.

The main question involved in the appeal is whether, according to the law prevalent in the Mahratta country of the Bombay Presidency, a Hindu widow, whose husband was undivided at the time of his death, and who has not the express permission of her husband, may adopt a son to him without the consent of the surviving coparceners. The parties are governed by the Mitakshara law, and on questions on which

1. (1868) 12 M. I. A. 397.
2. (1876) L. R. 3 I. A. 154: I. L. R. 1 Mad. 69 (P. C.).
3. (1871) 8 Bom. H. C., A. C. J. 114.
4. (1868) 5 Bom. H. C., A. C. 181.
5. (1898) I. L. R. 23 Bom. 327
6. (1904) I. L. R. 29 Bom. 51 at 59.
7. (1918) L. R. 46 I. A. 97: I. L. R. 43 Bom. 778: 36 M. L. J. 511 (P.C).
8. (1890) I. L. R. 14 Bom. 463.
9. (1919) I.L.R. 44 Bom. 483.
10. (1922) I. L. R. 47 Bom. 110.

the Mitakshara is silent, by the law as expounded in the Vyavahara Mayukha of Nilakantha.

The following pedigree shows the relationship between the rival claimants:—

Dyamangonda

[illegible]

[illegible]

[illegible] family property passed by survivorship to Dyamangouda. Dyamangouda died in August, 1919, leaving a widow Tungabai and a son Dattatraya, and the joint family property passed to Dattatraya by survivorship. Dattatraya was then about a year old, and Tungabai managed the property on his behalf.

On the 17th September, 1919, Bhimabai adopted appellant No. 2 as a son to her deceased husband Jivangouda. The

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adoption was not made under any express authority from her husband, nor was it made with the consent of Dattatraya who was then the sole surviving coparcener. Dattatraya, in fact, was a minor at that date, and incapable of giving his consent. It is the validity of this adoption that is in question in the appeal.

Dattatraya died a minor and unmarried on the 6th February, 1920. Shortly after his death, Tungabai delivered possession of the property to the respondent, purporting to do so under a consent decree in an arbitration proceeding between her and the respondent. Subsequently, on the application of the respondent, the Mamlatdar of Gadag ordered the property to be entered in his name in the record [illegible] but the order was set aside by the [illegible] Thereupon the respondent brought [illegible] the present appeal arises in the Court of the [illegible] Dharwar against the first and second appellants [illegible] who are not parties to the appeal [illegible] claration that he was [illegible] and asked for an injunction [illegible] interfering with his possession [illegible] the adoption of appellant No. 2 was [illegible] ent was not entitled to [illegible] Dattatraya. The defence [illegible] was that appellant No. 2 was [illegible] entitled to the property by [illegible] land, and it was agreed that [illegible]

The Subordinate Judge [illegible] ruling of the High Court at Bombay [illegible] that the adoption of appellant No. 2 was invalid, and passed a decree for the plaintiff. On appeal, the High Court at Bombay (consisting of Patkar and Baker, JJ.) confirmed the judgment of the Subordinate Judge, and passed a decree on the 28th February, 1928, dismissing the appeal with costs. It is against this decree that the present appeal has been brought to His Majesty in Council.

The question as to the validity of an adoption by a widow in a joint family was considered by the High Court at Bombay in *Ramji* v. *Ghamau*[2], where it was held that an adoption by the widow of a deceased coparcener, who had not her husband's

1. (1925) I.L.R. 50 Bom. 468 (F.B.). 2. (1879) I.L.R. 6 Bom. 498 (F.B.).

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express authority to adopt, was invalid, if made without the consent of the surviving coparceners. This case was considered by the Board in *Yadao* v. *Namdeo*[1]. Four years later, the same question again arose in Bombay in *Ishwar Dadu* v. *Gajabai* and it was referred to a Full Bench[2]. It was argued in that case that *Ramji* v. *Ghamau*[3] was overruled by the Board in *Yadao* v. *Namdeo*[1] and that the Board had in that case [illegible]

[illegible] appealed, and the appeal was heard by Sir Richard Couch, C. J., and Newton and Warden, JJ. The learned Judges held that the adoption, though made without the permission of the husband and without the consent of his

1. (1921) L R. 48 I.A. 513: I L.R. 49 C. 1: 42 M.L.J. 219 (P.C.).
2. (1925) I.L.R. 50 B. 468 (F.B.). 3. (1879) I.L.R. 6 Bom. 498 (F.B.).
4. (1868) 5 Bom. H. C., A. C. 181.

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sapindas, was valid. They also held that a senior widow had power to adopt without the concurrence of the junior widow. The judgment of the Court was delivered by Sir Richard Couch.

On the first question, the learned Chief Justice observed that the Mitakshara was silent on the point, and that it was therefore necessary to resort to the Mayukha by which the parties were governed. He then quoted pl. 17 and 18, sec. 5, ch. iv of the Mayukha, which relate to adoption by a widow, and considered the earlier Bombay decisions on the subject and the opinions of Pandits which had been given in those cases, and said:

"Upon the review which we have made of the authorities applicable in this part of India we are of opinion that in the Mahratta country wherein the property in question in this suit is situate, a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him, *if the act [illegible] motive*."

The clause printed in italics represented the Madras view which was held in a later case to be inapplicable in Bombay: see *Ramchandra* v. *Mulji*.[1] Omitting that clause the rest of the passage quoted above represents the construction put upon the Mayukha by the Court. The case in question was one of an adoption by a widow in a divided family, but it was not suggested there the Mayukha draws any distinction between an adoption by a widow in a divided family and an adoption by a widow in a joint family.

In *Ramji* v. *Ghamau*[2] the case which the appellants contend was overruled by the Board in *Yadao* v. *Namdeo*[3] the widow of a deceased coparcener adopted a son to her husband without his express permission and without the consent of the surviving coparceners. The case was heard by a Full Bench consisting of Sir Michael Westropp, C. J. and Melvill and Kemball, JJ. The learned Chief Justice, who delivered the judgment of the Court, said:

"Accepting, however, the view which the cases seem to establish, *viz.*, that the widow, where the husband dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, may adopt without the sanction of the husband (if he have not expressly, or by implication, indicated his desire that she shall not do so), and without the sanction of his kindred, we are not (as has been previously said in this Court in *Bayabai* v. *Bala*[4]) disposed to carry the deviation from ordinary Hindu law further than it has been already established by precedents."

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1. (1898) I. L. R. 22 Bom. 558. 2. (1879) I. L. R. 6 Bom 498 (F.B.)
3. (1921) L. R. 48 I. A. 513: I. L. R. 49 C. 1: 42 M. L. J. 219 (P. C.).
4. (1866) 7 Bom. H. C. Appx. i at p. xvii.

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The Court held that the decision in *Rakhmabai* v. *Radhabai*[1] was confined to the case of an adoption by a widow in a divided family, and concluded that a widow, whose husband was undivided at the time of his death, and who has not his express authority to adopt, cannot make a valid adoption to him without the consent of his coparceners. It is nowhere suggested in the judgment [illegible]

[illegible] Pundlik [illegible] Namdeo [illegible] Pandurang [illegible] Central Provinces [illegible]

[illegible] Judicial Commissioners held (as would appear from the record of the case printed for the Board), first, that the adoption had been prohibited by Pundlik, secondly, that the deed of adoption did not show that Pandurang had separated from Namdeo and

1. (1868) 5 Bom. H. C., A. C. 181.
2. (1879) I. L. R. 6 Bom. 498 (F B.).
3. (1921) L. R. 48 I. A. 513: I. L. R. 49 C. 1: 42 M. L. J. 219 (P.C.).

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Rambhau, and, lastly, that the family being still joint at the death of Pandurang, and the adoption having been made without the consent of Namdeo, it was invalid according to the ruling in *Ramji* v. *Ghamau*[1]. From that decree Yadao appealed to His Majesty in Council. Three points were argued before the Board on behalf of Yadao. First, it was argued on the authority of *Rakhmabai* v. *Radhabai*[2], that according to the law applicable to the parties, the widow had power to adopt to her husband without his permission and without the consent of his kinsmen, whether the husband was divided or undivided at the time of his death, and that the limitation sought to be imposed on that power—namely, that it could only be exercised when the estate was separate and vested in the widow—rested solely on the judgment in *Ramji* v. *Ghamau* and was not supported by any text or commentator. Next, it was argued that the adoption had not been prohibited by Pundlik either expressly or by necessary implication. Lastly, it was [illegible] that the widow's power [illegible] the estate [illegible] it was not joint at the time when the adoption was made as a separation had already been effected by the deed of adoption. On the other hand, it was argued on behalf of Namdeo that the adoption had been prohibited, that the deed of adoption neither effected nor evidenced a separation, and that in any case Pundlik having died joint, at his death his widow had not power to adopt without his authority, the fact of a subsequent partition could not give her authority, and reliance was placed on *Ramji* v. *Ghamau*.

The Board held that the deed of adoption showed that there was a separation between Pandurang and Namdeo, so that the estate of Pandurang passed to Champabai on his death as his heir. The Board also held that Pundlik had not prohibited the adoption. The estate being vested in her, and there being no prohibition to adopt, she was free to adopt another son to her husband without the consent of Namdeo, and she adopted Yadao. An adoption made in these circumstances was obviously valid, and required no further consideration. But both sides invited the Board to decide whether, even if Pandurang had not separated from Namdeo, Namdeo's consent was necessary to the adoption, and this question was considered in the latter part of the judgment.

1. (1879) I. L. R. 6 Bom. 498 (F. B.). 2. (1868) 5 Bom. H. C., A. C. 181.

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The judgment of the Board on this part of the case begins with an examination of *Ramji* v. *Ghamau*[1]. The Board first stated what the question to be decided in that case was, and after quoting some passages from the judgment and commenting on them, expressed its opinion thus:

"There does not appear to their Lordships to be any sound reason why in the Mahratta country of the Presidency of Bombay the Hindu Law as to the power of a Hindu widow who has not the authority of her deceased husband to adopt a son to him, should depend on the question whether her husband had died as a separated Hindu or as an unseparated Hindu, or on the question whether the property which was vested in her when she made the adoption was or was not vested in her as his heir."

Their Lordships are of opinion that in the passage quoted above the Board expressed its disapproval of the decision in *Ramji* v. *Ghamau*[1].

The Board then examined the judgment in *Rakhmabai* v. *Radhabai*[2] and said:

"That decision was not based upon the fact that the deceased husband was a separated Hindu, nor was it based upon the fact that at the time of the adoption, the widow who made the adoption had vested in her the whole or any part of the property which had belonged to her husband. Their Lordships regard it as equally applicable to an adoption by a Hindu widow of the Mahratta country of the Province of Bombay, whether her husband at the time of his death was joint or separate, and whether his property was or was not vested in her as his heir at the time when she made the adoption, and consider that it is a decision to be applied in this appeal."

This, their Lordships think, was a clear approval of the decision in *Rakhmabai* v. *Radhabai*[2].

In the result the Board held that the adoption of Yadao was valid. This conclusion was based on two grounds: (1) that there was a separation between Pandurang and Namdeo, in which case Champabai could undoubtedly adopt without the consent of Namdeo; and (2) that even if there was no separation, Champabai had the right to adopt Yadao without the consent of Namdeo.

Counsel for the respondent contended that the question at issue in *Yadao* v. *Namdeo*[3] did not turn on the actual decision in *Ramji* v. *Ghamau*[1] but on a single passage in the judgment, that "the widow of a Hindu, dying without leaving any male issue, may, if her husband were separated from his family in estate (or, in other words, where she is *his* heir), adopt without any express authority from him . . . and with-

1. (1879) I. L. R. 6 Bom. 498 (F. B.).
2. (1868) 5 Bom. H. C. A. C. 181.
3. (1921) L. R. 48 I. A. 513: I. L. R. 49 C. 1: 42 M. L. J. 219 (P. C.).

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out the consent of his relatives." He maintained that the whole question before the Board was whether Champabai, having the estate vested in her, not as her husband's heir, but as heir of her son, could make a valid adoption without the consent of Namdeo, and that the Board held that she could. Their Lordships are unable to adopt this view. The Court of the Judicial Commissioner had held that Pandurang having died undivided, and his interest having passed by survivorship to Namdeo, the decision in *Ramji* v. *Ghamau*[1] applied, and that the adoption having been made without the consent of Namdeo, it was invalid. The very first argument on behalf of Yadao, as appears from the report, was that *Ramji* v. *Ghamau*[1] was wrongly decided, not that any particular proposition in it was incorrect, and *Rakhmabai* v. *Radhabai*[2] was cited as laying down a rule of law directly contrary to the decision in *Ramji* v. *Ghamau*[1]. That is what was argued before the Board, and that is the argument that was accepted by the Board.

Counsel for the respondent also relied upon some passages in the judgments of the Board in *The Ramnad case*[3] and in *Sri Raghunadha* v. *Sri Brozo Kishoro*[4] in support of his contention that the Board could not have intended to overrule *Ramji* v. *Ghamau*[1]. In *The Ramnad case*[3] the Board held that in the case of an undivided family, the father of the husband was competent, by his sole assent, to authorise an adoption by a widow, and if the father was not then living, "the consent of all the brothers who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." In *Sri Raghunadha* v. *Sri Brozo Kishoro*[4] a widow in an undivided family adopted without the consent of the husband's coparceners and with the consent of a distant and separated sapinda. The Board observed that "there seem to be strong reasons against the conclusion that for such a purpose as that now under consideration, she can, at her will, travel out of the undivided family and obtain the authorisation required from a separated and remote kinsman of her husband." The Board also observed

1. (1879) I. L. R. 6 Bom. 498 (F. B.). 2. (1868) 5 Bom. H. C., A. C. 181.
3. (1868) 12 M. I. A. 397.
4. (1876) L. R. 3 I. A. 154: I. L. R. 1 M. 69 (P. C.).

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that "there are grave social objections to making the succession of property dependent on the caprice of a woman, subject to all the pernicious influence which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property," and that it was the duty of the Courts to keep the power strictly within the limits which the law had assigned to it.

Now both these cases were from Madras, and according to the law as stated in the commentaries of that school, a widow, who has not the express authority of her husband, cannot adopt a son to him without the consent of his kinsmen. The commentaries, however, do not specify all the kinsmen. All that they say is that the consent to be obtained must be the consent of "the husband's father, etc." In both the cases the High Court at Madras considered that, in the absence of the husband's father, the consent of any kinsman was sufficient, but the Board intimated its dissent from that view. The Board held that the consent to be obtained, when the family was undivided, must be the consent not of a separated kinsman who had no interest in the property, but of his (the husband's) coparceners to whom his interest had passed on his death by survivorship, and it was in this connection that the observations of the Board quoted above were made. These observations cannot apply to an adoption by a widow in Bombay. The Mayukha and the Kaustubha, which govern the Mahratta school, regard adoption by a widow as a religious duty, which does not require the authority either of the husband or of his kinsmen. If no consent is required, no question of injustice or hardship to the kinsmen can arise.

For the reasons stated above, their Lordships are of opinion that *Ramji* v. *Ghamau*[1] was overruled by the Board in *Yadao* v. *Namdeo*[2] and that the opposite view taken by the Full Bench of the High Court at Bombay in *Ishwar Dadu* v. *Gajabai*[3] is wrong. Their Lordships may add that they agree with their predecessors that *Ramji* v. *Ghamau*[1] was wrongly decided, and that the correct view of the law is that expressed in *Rakhmabai* v. *Radhabai*[4].

1. (1879) I. L. R. 6 Bom. 498 (F. B.).
2. (1921) L. R. 48 I. A. 513: I. L. R. 49 C. 1: 42 M. L. J. 219 (P. C.).
3. (1925) I. L. R. 50 Bom. 468 (F. B).
4. (1868) 5 Bom. H. C., A. C. 181.

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Their Lordships are, therefore, of opinion that the adoption of appellant No. 2 was not invalid on the ground that it was made by Bhimabai without the express permission of her husband and without the consent of the surviving coparcener.

It was pressed on their Lordships that *Ramji* v. *Ghamau*[1] had been accepted and acted upon in the Presidency of Bombay since 1879, and that the decision should not be disturbed. But this is a belated appeal. It should have been made when *Yadao* v. *Namdeo*[2] was before the Board. *Yadao* v. *Namdeo*[2] was decided so far back as 1921, and if the High Court at Bombay, after that decision, followed *Ramji* v. *Ghamau*[1], it was wrong in so doing.

Their Lordships will now turn to the other contentions raised on behalf of the respondent.

The first of these rests on the decision of the High Court at Bombay in *Chandra* v. *Gojarabai*[3] and other cases following it. The question in that case was whether an adoption by the widow of a coparcener, after the death of the last surviving coparcener, and after the estate had vested in his widow or another person as his heir, was valid, and it was held that it was not. The reason for the decision was thus stated by Telang, J.: "When the inheritance devolved from Nana [the last surviving coparcener] upon his widow, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated householder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption." Relying on this decision, it was argued that the last surviving coparcener at the date of the death of Jivangouda was Nilkanthagouda, and that the adoption of appellant No. 2 having been made after the death of Nilkanthagouda, it was invalid. But Nilkanthagouda was not the sole surviving coparcener at the date of *his* death which, according to the decision cited above, would be the material date. Nor did the estate pass to Dyamangouda by inheritance as his heir. The coparcenary at the death of Nilkanthagouda consisted of himself and Dyaman-

1. (1879) I. L. R. 6 Bom. 498 (F. B.).
2. (1921) L. R. 48 I. A. 513: I. L. R. 49 C. 1: 42 M. L. J. 219 (P. C.).
3. (1890) I. L. R 14 Bom. 463.

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gouda, and the estate passed to Dyamangouda by survivorship. The adoption of appellant No. 2 was not made after the extinction of the coparcenary, but during its subsistence, the last surviving coparcener being Dattatraya. Their Lordships are, therefore, of opinion that the principle of the decision mentioned above does not apply.

Another argument for the respondent against the validity of the adoption was that if the adoption of appellant No. 2 were upheld, the result would be that while a paternal grandmother could not adopt, a grandaunt could adopt. It is true that Nilkanthagouda having died leaving a son, and that son having himself died leaving a son, Nilkanthagouda's widow could not have adopted a son to her husband. But that is because her power to adopt came to an end the moment Dyamangouda died leaving a son: [see *Ramkrishna* v. *Shamrao*[1]]. It was not so in the case of Bhimabai. Her power to adopt, when she adopted appellant No. 2, had not come to an end; it was still subsisting. Their Lordships think that there is no force in this argument.

The last argument for the respondent was founded on the deed of adoption executed by Nilkanthagouda in favour of Dyamangouda. The material portion of the document is as follows:—

"So I have this day taken you in adoption according to our religion. (But the conditions that have been made are mentioned below :—) 'During my lifetime I alone am to carry on *vahivat* of my entire movable and immovable property which has been in my possession from before the time of my taking you in adoption. You should live and be taken care of in my home. And after my death you should take my movable and mmovable property into your possession and should carry on *vahivat* thereof as a son born of my loins'."

It was argued for the respondent that on a true construction of this document, Dyamangouda did not take any interest in the property on adoption, that the property was given to him by way of gift which was not to take effect until after the death of Nilkanthagouda, and that all that Dyamangouda was entitled to during Nilkanthagouda's lifetime was maintenance. On this construction of the document, it was contended, that Dyamangouda did not enter the family as a coparcener, and that the coparcenary came to an end on the death of Nilkantha-

1. (1902) I. L. R. 26 Bom. 526 (F. B.).

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gouda. Their Lordships do not think that that is the true meaning of the document. Dyamangouda was an adult at the date of adoption, and all that Nilkanthagouda intended to do by this writing was to exclude Dyamangouda from the possession and management of the property in his lifetime, and to retain sole control thereof in his own hands.

In the result, their Lordships are of opinion that appellant No. 2 was validly adopted by Bhimabai as a son to her husband.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated the 28th February, 1928, and that of the Subordinate Judge, dated the 8th April, 1925, should be set aside, and that the suit should be dismissed. The respondent must pay the appellants' costs in the Courts below and before this Board.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, SIR JOHN WALLIS AND SIR DINSHAH MULLA.

Srimati Indira Rani Ghose .. *Appellant**

v.

Akhoy Kumar Ghose, since deceased .. *Respondent.*

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Srimati Indira Rani Ghose v. Akhoy Kumar Ghose.

Succession Act (XXXIX of 1925), Ss. 124 and 131—Construction of Hindu will—Gift over "in the event of any sons dying without leaving male issue him surviving"—Death at any time, and not merely in the testator's lifetime.

The testator, a Hindu governed by the Dayabhaga Law, executed a will bequeathing, by clause 14, the whole of his residuary estate to his sons in the manner following:—

"I devise and bequeath the whole of my estate—in trust for such of my sons as shall be living at my death—and also for the son or sons of such of my sons as shall then be dead (such son or sons taking the share their or his father would have taken hereunder had they or he been then alive)—equally as tenants in-common and the said sons or sons of my sons taking equally *per stirpes* as tenants-in-common, but nevertheless in the event of any sons or son's sons dying without leaving lineal male issue him surviving

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the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu Law."

The testator died in 1904, leaving his widow and two sons, *S* and *A* him surviving. The elder son *S* died in 1930 intestate without any male issue, but leaving him surviving his widow (the plaintiff) as his sole heiress under the Dayabhaga Law and an infant daughter.

The plaintiff thereupon brought the present suit against the surviving son *A*, claiming that on a true construction of the will, her husband *S* had, at his death, become absolutely entitled to his equal half share of the residuary estate, and that on his death intestate his half share devolved upon herself as sole heiress.

Held, (negativing the plaintiff's contention) that, on a true construction of the will as a whole, S 131 and not S. 124 of the Indian Succession Act, 1925, was applicable, and that the half share of *S*, on his death without male issue, passed under the gift over to the younger son *A* (the defendant).

The words " dying without leaving lineal male issue him surviving " (in clause 14 of the will) are *prima facie* to be construed in their literal significance as referring to death *at any time*, and not merely in the lifetime of the testator. The question is one entirely of intention, and though this rule of interpretation will yield to any sufficient intention to a contrary effect to be found in the language of the will taken as a whole, there was in the will in dispute no indication of a contrary intention sufficient to displace the *prima facie* meaning of the words used in clause 14.

Section 124, Indian Succession Act, 1925, does not apply if a period is specified in the will within which the contingent event is to happen. In other words, the section only applies, if on a reasonable interpretation of the language used by the testator, the occurrence of the uncertain event prior to "the period when the fund bequeathed is payable or distributable" is alone within his contemplation. If the terms of the will make that construction of his words impossible, the section then does not apply.

Wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life, though executed in the English language and character, must not be interpreted by the application to them of a too rigid construction of the English language.

Norendra Nath Sircar v. *Kamalbasini Dasi*, (1896) L. R. 23 Ind. App. 18: I. L. R. 23 Cal. 563: 6 M. L. J. 71 (P.C.), distinguished.

Home v. *Pillans*, (1833) 2 My. & K. 15: 39 E. R. 850; *Christian* v. *Taylor*, (1926) A. C. 773 and In re *Roberts*, (1916) 2 Ch. 42, referred to.

Appeal No. 98 of 1931 from a judgment and decree of the High Court at Calcutta made in its Civil Appellate Jurisdiction, dated the 2nd April, 1931, setting aside the decree of the High Court in its Ordinary Original Civil Jurisdiction, dated the 22nd December, 1930.

The judgment of the High Court is reported in *Akhoy Kumar Ghose* v. *Indira Rani*, A. I. R. 1931 Cal. 499: 135 I. C. 868: 56 C. L. J. 417.

The question in the appeal was one of the construction of the will of one Romanath Ghose, a Hindu governed by the Bengal School of Hindu Law. The material terms of the will are set out in their Lordships' judgment.

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Wilfrid Greene, K. C., Wallach and *U. C. Laha* for appellant.—The appellate Court erred in applying S. 131 of the Indian Succession Act; this section is expressly made subject to S. 124.

The period of distribution was, as rightly held by the Trial Court, the death of the testator: *Norendra Nath Sircar* v. *Kamalbasini Dasi*[1]. The words of clause 14 of the will refer to death in the lifetime of the testator. The fourth rule as laid down by Lord Romilly, M.R., in *Edwards* v. *Edwards*[2] has been enacted in S. 124 of the Indian Succession Act, and in Illustration (4) thereto.

Decisions of the House of Lords in *O'Mahoney* v. *Burdett*[3] and *Ingram* v. *Soutten*[4] and of the Privy Council in *Christian* v. *Taylor*[5] and *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey*[6] referred to.

The bequest over in favour of the defendant Akhoy did not take effect, as the contingency, *viz.*, the death of Sideshwar Ghose without any male issue, did not happen before the period of distribution.

Further, we submit that the gift over followed an absolute gift and was therefore void for repugnancy and could not operate as a divesting clause: per Lord Brougham in *Home* v. *Pillans*[7]. The provision as to gift over is not a divesting clause but is an attempt to alter the legal course of succession to an absolute estate and is therefore void.

Sideshwar survived the testator and took an absolute indefeasible estate in the legacy: *Monohur* v. *Kasiswar*[8].

De Gruyther, K. C., Sir Dawson Miller, K. C. and *P. R. Dass* for respondent.—Clause 14 of the will must be construed as referring to death *at any time*: per Viscount Haldane in *Christian* v. *Taylor*[5]. The fourth rule in *Edwards* v. *Edwards*[2], upon which the appellant relied, has been overruled: see *O'Mahoney* v. *Burdett*[3] and *Ingram* v. *Soutten*[4].

The clause of defeasance in the will is a valid clause, and the gift over in favour of the defendant Akhoy has taken effect. The terms of clause 14 of the will attract the operation of S. 131 and not that of S. 124 of the Act. Section 134 also referred to.

Reference was also made to *Chunilal Parvatishankar* v. *Bai Samarth*[9].

Greene, K. C., replied.

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1. (1896) L. R. 23 I. A. 18: I. L. R. 23 C. 563: 6 M. L. J. 71 (P. C.).
2. (1852) 15 Beav. 357: 51 E. R. 576.
3. (1874) L. R. 7 H. L. 388.
4. (1874) L. R. 7 H. L. 408.
5. (1926) A. C. 773.
6. (1915) L. R. 43 I. A. 12: I. L. R. 43 Cal. 432: 30 M. L. J. 110 (P. C.).
7. (1833) 2 My. & K. 15: 39 E. R. 850.
8. (1897) 3 C. W. N. 478.
9. (1914) I. L. R. 38 Bom. 399: 26 M. L. J. 647 (P. C.).

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Lord Blanesburgh.

13th October, 1932. Their Lordships' judgment was delivered by

LORD BLANESBURGH.—The question at issue on this appeal is concerned with the ultimate destination of the share of his residuary estate given by a Hindu testator to the elder of two sons who survived him. Did the share, on the death of that elder son without male issue, pass under a gift over to the younger son, or has it, as the absolute property of the deceased under the original gift to him in the will, devolved upon his widow, the appellant, sole heiress in his intestacy?

The question is one of construction upon which the two Courts in India are not in accord, and when regard is had to the looseness of the phraseology adopted *passim* in the will by the testator or his draftsman it must be felt that its true meaning raises issues upon which there is ample room for divergence of view. It is comparatively easy to determine what this Indian testator meant to say. The difficulty is to be satisfied judicially that in his English language he has succeeded in saying it.

The testator, one Romanath Ghose, was a Calcutta Hindu, governed by the Bengal School of Hindu Law. He died on the 26th July, 1904. He was survived by his widow and by two sons, Sideshwar Ghose and Akhoy Kumar Ghose, both of them, at his death, infants of tender years. It is not clear on the record whether or not he was actually survived by a daughter. But the true position in that matter, whatever it may have been, would not affect construction, and it is not otherwise here important. The testator had certainly a daughter at some time. One of his executors is described as his son-in-law. And in his will, as we shall see, he clearly contemplates the possibility that both daughters and granddaughters may survive him. But apart from a small sum for her marriage ceremony, the testator makes no testamentary provision for any daughter or granddaughter—a circumstance indicative of an attitude to female descendants which, as will be seen, is characteristic.

The will is dated the 30th October, 1903. By it the testator appoints as his executors and trustees, his widow and her brother, his own son-in-law, another named person, and such and so many of his sons attaining the age of 22 years as shall be orthodox Hindus of good repute. He defines in clause 2 the conditions which qualify for that description when it is used in his will, as it quite frequently is. He directs and authorises

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his executors and trustees to expend upon his first and subsequently remaining annual *shradhs* and upon the funeral and subsequently remaining annual *shradhs* of his wife sums of prescribed amounts, without in this instance indicating the source from which these sums are to come. He directs his executors and trustees "from and out of the income of [his] estate" to pay to his wife if she continues to be an orthodox Hindu of good repute an annuity for her life and also to defray the sums not exceeding a prescribed amount required for her pilgrimages and religious expenses and ceremonies from time to time. He directs and authorises his executors and trustees "out of the income of [his] estate" to pay an annuity to his mother for the term of her natural life. She is also to be entitled to reside in his dwelling-house at Benares whenever she wishes to do so. He directs and authorises his executors and trustees "from and out of [his] estate" to expend the sum of Rs. 10,000 on the occasion of the marriage of each of his sons and daughters unmarried at the time of his death. And by clause 12 he directs and authorises his executors and trustees to pay a large number of pecuniary legacies and annuities "out of [his] estate," two of which are now transcribed, because reference will later be made to their phraseology :—

"(i) A sum of rupees two thousand to each of my grandsons by daughter, namely, rupees one thousand at the time of their marriage.

"(j) A sum of rupees one thousand to each of my granddaughters by daughter at the time of their marriage."

Clause 14 is the clause of the will directly relevant to the question at issue. It is convenient to set it forth textually, together with clauses 10 and 11, which are also in point, if less immediately so :—

"10. My estate shall not be partitioned until the youngest of my sons shall attain the age of twenty-five years, but my said sons shall be properly maintained and educated out of the income of my estate. If any of my sons try to effect a partition before the time aforesaid he shall forfeit a fourth part of his legal share.

"11. In case I die without any son or grandson by son my widow shall be entitled to adopt three sons in succession, and I do hereby grant her the requisite permission to do so.

"14. Subject to the payments of the legacies and annuities aforesaid (the latter unless otherwise expressly provided being payable during the terms of the natural lives of the annuitants) as well as to the provisions hereinbefore mentioned, I devise and bequeath the whole of my estate real or personal of any kind or description whatsoever and wheresoever situate to my said executors and trustees in trust for such of my sons as shall be living at my death or come into existence within twelve months after my death and also for the son or sons of such of my sons as shall then be dead (such son

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or sons taking the share their or his father would have taken hereunder had they or he been then alive) provided the said sons or son's sons shall be orthodox Hindus of good repute equally as tenants-in-common and the said sons or sons of my sons taking equally *per stirpes* as tenants-in-common, but nevertheless in the event of any sons or son's sons dying without leaving lineal male issue him surviving the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu Law, but should I die without lineal male descendants the son or sons to be adopted by my wife shall inherit the whole of my residuary estate, but he shall not be put in possession until he attains the age of twenty-one years, and should any of my heirs or residuary legatees cease to be orthodox Hindus of good repute he shall forfeit a moiety of his share, which shall go to my other qualified heirs according to their respective shares."

The will very plainly is the work of a draftsman whose knowledge of the niceties of English is imperfect. In not a few instances a strictly literal construction of the words used would lead to a result possibly of zero, certainly incomplete, and that, although the meaning intended is not obscure. For instance, the use of the word "namely" in clause 12 (*i*) produces a result unintelligible, were construction there not assisted by contrasting the sub-section with sub-section (*j*) which immediately follows it. More particularly, however, is the lapse from accuracy of statement or reference to be found in clause 14, and almost from the beginning to the end of that clause.

Three things, however, may be said of the will, reading it as a whole.

First, the testator plainly contemplates the continuance of the trusts for an indefinite period after his death. An annuity is normally to continue for the life of the annuitant, and there are many annuities: payment for *shradhs*, remote it may be in time, is to be made. Payments, indefinite in duration, are to come out of the estate or out of its income. The testator's Benares house must be retained at least so long as his widow lives.

Secondly, the testator contemplates in more than one instance the forfeiture in whole or in part of a vested gift, should the donee cease to be an orthodox Hindu of good repute.

But, thirdly, and most pointedly of all, the exclusion of every daughter or granddaughter from any participation in residue is plainly of set purpose. Here is a predominant note in the will. As to a daughter-in-law, she is never once mentioned from beginning to end.

There were disputes between his representatives almost immediately after the testator's death, and by an order of the

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High Court made in March, 1905, the executrix and executors were discharged. Thereafter up to the 25th July, 1919, the estate was administered by the High Court through receivers appointed from time to time. After the testators's elder son, Sideshwar Ghose, had attained the age of 18 he applied for and on the 21st May, 1919, he obtained an order for the grant to himself of letters of administration *de bonis non* with the will annexed. By order of the Court of the 25th July, 1919, the receivers were directed to make over possession of the estate to him, and he was in possession thereof and administering it until his death. On the 13th February, 1930, he died intestate and without male issue, but leaving him surviving his widow, the present appellant, and an infant daughter. Under the Bengal School of Hindu Law, by which he, like his father, was governed, his widow is the sole heiress to his property; failing her, Sideshwar's daughter would have been sole heiress.

Akhoy Kumar Ghose, the testator's younger son, survived Sideshwar, and, in view of the third of the contentions put forward by the appellant, and later to be discussed, it is important to note that at Sideshwar's death both he and Akhoy had attained the age of 25, the age mentioned in clause 10 of the will.

When Sideshwar died the question arose whether the gift over of his share of residue under clause 14 still remained operative, and whether, if it did, the words of destination were, in the event, capable of carrying over the share to Akhoy, who alone claimed it. On the view that the gift over did take effect and in his favour, Akhoy applied for and on the 30th May, 1930, obtained probate of the will, and thereupon took possession of the entire estate, claiming that the widow of Sideshwar, even if his sole heiress, had no interest whatever in it.

The widow refused to accept that position, and on the 3rd July, 1930, she instituted against Akhoy in the High Court of Judicature at Fort William in Bengal the suit out of which the present appeal arises. Therein she claimed a declaration that in the events which had happened and on a true construction of the testator's will Sideshwar had at his death become absolutely entitled to his equal half share of the residuary estate, subject to proportionate provision thereout for the pecuniary legacies and annuities already referred to. She asked also, perhaps somewhat irregularly in a suit relating only to

the estate of the testator, for a declaration that on the death intestate of Sideshwar his half share devolved upon herself, and there was a claim for consequential relief.

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The suit came on for hearing before Mr. Justice Buckland, exercising the ordinary civil jurisdiction of the High Court, and on the 22nd December, 1930, the learned Judge came to the conclusion that the plaintiff was entitled to the relief for which she asked. And he so declared.

On appeal by the defendant, Akhoy, to the Divisional Bench of the Court, the learned Judges there, on the 2nd April, 1931, allowing the appeal, rejected the plaintiff's claim to a half or any share in the *corpus* of the estate of the testator. They reserved, however, to her the right to apply to the Judge on the Original Side of the Court, to whom the matter was remitted, to deal with claims of detail made by her and upon which there had so far been no adjudication by that Court.

The present appeal to His Majesty in Council is from that judgment of the 2nd April, 1931. The plaintiff-appellant's desire is to have the decree of Mr. Justice Buckland restored. It only remains to state that on the 21st May, 1931, during the pendency of the appeal, the defendant Akhoy died, and his estate is now represented by the respondents, the executors of his will.

The appellant's contentions in support of her appeal were threefold and alternative. The first was that the terms of clause 14 of the will, in so far as the gift over is concerned, are governed by the provisions of S. 124 of the Indian Succession Act (XXXIX of 1925), the terms of which it may be recalled are as follows:—

" Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

Expressing the contention in terms of the event which has happened the appellant's argument was that upon the true construction of clause 14 Sideshwar's death without leaving lineal male issue him surviving was confined to his death in the lifetime of the testator, an uncertain event with no time mentioned in the will for its occurrence; that in terms of the will the original gift to him was payable or distributable on the death of the testator, and that accordingly the gift over—the " legacy "

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of the section—could not, if the section was to be obeyed, take effect. In other words, the original gift to Sideshwar became at the moment of the testator's death, and as a result of the section, absolute and indefeasible.

This contention had commended itself to the learned Trial Judge, Mr. Justice Buckland. He accepted the view that it was justified by the judgment of this Board in *Norendra Nath Sircar* v. *Kamalbasini Dasi*[1] which he treated as governing the present case. Their Lordships, in agreement with the Divisional Bench, are of opinion that no such conclusion is warranted by that judgment, and ultimately the learned Judge's view was not, before them, seriously maintained.

Death in the case cited was clearly on the will confined to "death" in the testator's lifetime. In the present case, however, notwithstanding the appellant's original contention to the contrary, it is clear, their Lordships think, that the death of a son or son's son referred to in this will is the death of one who has taken something under the original gift contained in it; that is to say, it is a death which must take place after that of the testator. This distinction between the cases is, for the present purpose, vital. It is true that in each the event remains uncertain. In the present case, it not being a case of death *simpliciter*, it might even after the death of the testator never have happened at all. But was it an uncertain event with reference to which it could be said that "no time is prescribed in the will for its occurrence"?. The answer must, their Lordships think, be in the negative. The two first illustrations attached to S. 124 make clear what may be only implicit in the actual wording of the section, namely, that it does not apply if a period is specified in the will within which the contingent event is to happen, or, putting it otherwise, that the section only applies, if without doing violence to the terms of the will, it can be held, as a matter of words, that the occurrence of the uncertain event prior to "the period when the fund bequeathed is payable or distributable," is alone within the contemplation of the testator. If the terms of the will make that construction of his words impossible, the section then does not apply.

It will suffice in exposition of this statement to refer to the first of the illustrations attached to the section:—

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1. (1896) L. R. 23 I. A. 18: I. L. R. 23 C. 563: 6 M. L. J. 71 (P. C.).

"A legacy is bequeathed to *A*, and in case of his death to *B*. If *A* survives the testator the legacy to *B* does not take effect."

In the case illustrated it is possible without doing violence to the words to refer the specified death of *A* to his death in the lifetime of the testator. And so much being possible, the section requires that *A's* death shall be so referred.

But does not the illustration equally plainly connote that it would have become the illustration of a case to which the section had no application if, instead of being worded as it is, it had run:

"A legacy is bequeathed to *A*, and in case of his death before or after that of the testator to *B*,"

a case in which the legacy to *B*, on the testator's very words must take effect just as certainly if *A* survived the testator, as if he predeceased him. In other words, *A's* interest in the legacy, *B* surviving, is cut down to a life-interest, and S. 131 of the Act becomes relevant as an enabling provision. That section, it will be recalled, is as follows:—

"A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen the thing bequeathed shall go to another person."

The section is made subject to, amongst others, S. 124. Freed from the operation of that section, as, in their Lordships' judgment, for reasons already given, the present gift is, there seems to them, as there seemed to the learned Judges of the Divisional Bench, no reason why S. 131 should not here have full effect, unless, indeed, some other objection to the efficacy of the gift over can be found. And in her remaining contentions the appellant sought to find two.

The first of these proceeded on the footing that the gift over had taken effect. Thereupon the submission was that on the terms of that gift properly understood there was no effective destination of Sideshwar's original share to any person, and that accordingly, on the well-authenticated principle of *Home* v. *Pillans*[1], the original absolute gift to him remained.

This conclusion was reached as a result of the construction placed by the appellant on the immediately relevant words of cl. 14 of the will, repeated now for convenience of reference:—

"But nevertheless in the event of any sons or son's sons dying without leaving lineal male issue him surviving the other of my son or sons or son's

1. (1833) 2 My. & K. 15: 39 E. R. 850.

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sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu Law."

Reading these words without assistance in construction from any other provision in the same clause, learned Counsel, in an elaborate argument, insisted that the words "him surviving" are the key-words to what follows: that the share being disposed of is still the share of "him," the deceased son or son's son: and that "his or their share" of the property to which the "other" of the testator's son or sons or son's sons living at the time are to be entitled equally grammatically must be, and, in fact is, the share of the deceased which *he or they* would inherit *from him* under the Hindu Law. From this the next step was easy. That share was no share at all, because the only person to take any interest in Sideshwar's property under the Hindu Law is the appellant, Sideshwar's widow. Failing her, his daughter. The gift over, accordingly had on the death of Sideshwar no effect. Indeed, if the construction suggested be sound, the gift over on the death of any son or son's son leaving a widow or a daughter, can never have any effect, and the testator's purpose in providing that a son's or son's son's share is to go over on his death without leaving lineal male issue him surviving might never be attained. On this construction the share of the deceased could not go over if he left a widow or daughter him surviving, a result entirely outside the testator's scheme of distribution and, so far as it might be operative to confer benefits either upon one or the other quite contrary to his intention.

To their Lordships this appears to be peculiarly a case similar to those referred to by Lord Macnaghten when delivering the judgment of the Board in *Norendra Nath Sircar's* case[1] in which care must be taken lest the wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life, are interpreted by the application to them of a too rigid construction of the English language. Particularly must this consideration be in mind if it appears that a rigid construction leads to such consequences as have just been indicated.

Here, however, in their Lordships' view, the appellant's construction of the will does not survive examination. A conscious intention on the part of a testator to dispose of property

1 (1896) L. R. 23 I. A. 18: I. L. R. 23 C. 563: 6 M. L. J. 71 (P. C.).

in the hands of another person under a gift from himself is not lightly to be imputed. Less likely is it that the persons to take under that disposition, and as on an intestacy of the first donee, would be described in terms of relationship not to the donee but to the testator himself.

And this more general criticism of the appellant's construction is reinforced on closer examination of the actual words of the testator, showing as it does that he is here doing none of the things thereby imputed to him. Three very helpful aids to the true meaning of the words employed are supplied by reference to the same words in other parts of cl. 14, where their signification is unambiguous.

First, as to the words "him surviving". This, it then becomes apparent, is the testator's phrase to convey a meaning which another draftsman, better instructed, would express by the use of such words as "them respectively surviving". The word "he," in this way three times used in the last branch of the clause, justifies this statement:—

"But should I die without lineal male descendants the son or sons to be adopted by my wife shall inherit the whole of my residuary estate, but *he* shall not be put in possession until *he* attains the age of twenty-one years, and should any of my heirs or residuary legatees cease to be orthodox Hindus of good repute *he* shall forfeit a moiety of his share."

Further examination of the clause discloses another mannerism of this testator in using the word "or" where, to convey the same meaning, a more competent draftsman would inevitably use the word "and". It may be gathered from other parts of the clause that where the testator describes the donees under the gift over as "the other of my son *or* sons *or* son's sons living at the time," another draftsman better versed in English would in each place have used the word "and" to convey his meaning.

Again the signification of "and" *must* be attached to the word "or" in the phrase immediately preceding the gift over:—

"Provided the said sons *or* son's sons shall be orthodox Hindus of good repute . . . and the said sons *or* sons of my sons taking equally *per stirpes*."

The sons and the son's sons in each case referred to, take, *all* of them, a share under the immediately preceding gift. Yet the testator's word is "or". This use of the word in place of "and" is again seen, although perhaps less appositely, in the bequest at the commencement of the clause of "the whole of

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my estate real *or* personal of any kind *or* description whatsoever".

And now, assisted in construction by this dictionary supplied by the will itself, their Lordships cannot doubt that the words "him surviving" in this clause should be read as the testator's equivalent for such words as "them respectively surviving": that the "other" of the testator's sons or son's sons to take are confined to sons or son's sons who, ***like the deceased***, were original takers under the previous gift: that by the words "his or their share of the property" the testator is referring, not to any share to be ***taken*** under the gift over, but to the share in his (the testator's) property by the will originally ***given*** to the deceased son or son's son. In other words, on their true construction the effect of the testator's words of destination is as follows:—

"In the event of any of my sons or son's sons [to whom a share of residue has been given] dying without male issue them respectively surviving the other of my son and sons and son's sons living at the death of the deceased [and being also sons or son's sons entitled to a share of residue under this my will, and entitled also to inherit from me under Hindu Law] shall take in equal shares the property comprised in the original gift to the deceased."

That to their Lordships seems to be an exact paraphrase of the words of the will, in their true signification, and, as so paraphrased, the words convey the share to a destination sufficiently clearly described and in no sense obnoxious to Hindu Law. Whether this accrued share of an original taker would or would not be subject to defeasance like his original share: whether the son or son's son would "inherit under Hindu Law" because he was beneficiary under the testator's will, or because he could qualify on intestacy, are questions which need not delay their Lordships now, for the gift on either view would be equally valid according to Hindu Law, and Akhoy, who in the event is the only claimant to Sideshwar's share, fulfils all qualifications. Accordingly, in their Lordships' judgment, this second contention of the appellant also fails.

Her third contention was first made in argument before their Lordships' Board. It is not raised by the appellant's printed case. It was not given as a reason in her application

for leave to appeal to His Majesty in Council. It is not mentioned in any of the judgments of the Courts below. Based as it is on a view of the will entirely contrary to that upon which the appellant had hitherto proceeded, namely, that the period of distribution of residue was the death of the testator, their Lordships cannot think that any reference to the point if, in India, it was made in argument, was seriously made.

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In these circumstances, it is with some hesitation that they deal with it at all. Had they felt disposed favourably to entertain it they would in fairness to the respondents have hesitated to pronounce against them without in the first instance obtaining the views of the Divisional Bench upon its soundness. They think, however, that the contention fails, and as it is by the appellant that it is only now raised they will dispose of it. Alternative to the appellant's other two contentions, it is that on the true construction of the will, while there may have been a vesting in interest of Sideshwar's share at the death of the testator, there was an actual vesting in possession under cl. 10 of the will on the attainment by Akhoy of the age of 25, in no sense displaced by Sideshwar's death after that vesting. The trusts of the residue thereupon came to an end. Sideshwar's share then became his own indefeasibly and absolutely and now devolves upon the appellant as his widow.

In support of this contention reliance was mainly placed upon the judgment of the Board in *Christian* v. *Taylor*[1] and of Sargant, J., as he then was, in In re *Roberts*[2] and In re *Brailsford*[3]. Of the words of cl. 14, "in the event of any sons or son's sons dying without leaving lineal male issue him surviving," it may be said as Lord Haldane said of the corresponding words of the will in *Christian* v. *Taylor*[1], that they

> "Are *prima facie* to be construed in their literal significance as referring to death at any time . . . This rule of interpretation will yield to any sufficient intention to a contrary effect to be found in the language of the will taken as a whole, but apart from any such indication death at any time is what the words taken by themselves must be assumed to mean."

If the contrary intention to which Lord Haldane refers is to be found in this will, it can only be so found by reading cl. 10 as amounting to a provision that on attainment of the age of 25 by the youngest of the testator's sons there is to be a

1. (1926) A. C. 773.
2. (1916) 2 Ch. 42.
3. (1916) 2 Ch. 536.

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division of the property in specie and the trusts of cl. 14 are then to come to an end.

Their Lordships are unable to find all this in a clause so partial and colourless as cl. 10.

First of all it is a clause applicable only to sons. It has no reference to son's sons or adopted sons, although the provisions of cl. 14 are applicable as much to son's sons as to sons.

Secondly, cl. 10 is negative and not positive in form. It says that there shall be no partition before a certain event; but it does not, even by implication, require that there shall be any partition after that event. Still less does it suggest that even after that partition the then unexhausted provisions of the will to which reference has been made shall cease to have paramount effect. Their Lordships are well aware of S. 343 of the Succession Act, as a result of which the annuities at any rate might be provided for so as to permit of a partition for an absolute estate, notwithstanding their continuance. But that section does not make it possible to say of this testator that it was his intention that the trusts declared by him in cl. 14 should cease to be operative, and in the hands of his trustees, at any moment before they were completely fulfilled.

Their Lordships have, in short, been unable to find in this will any indication of an intention sufficient to displace the *prima facie* meaning of the words used in cl. 14. And the question is solely one of intention.

In the result, therefore, their Lordships conclude that the appeal fails and should be dismissed. And they will humbly so advise His Majesty.

The costs of both parties to the appeal, taxed as between solicitor and client, ought, they think, to be paid out of the estate. The difficulty has been created by the testator himself, and it was properly brought before His Majesty in Council for final solution.

Solicitors for appellant: *Callingham, Ormond and Maddox.*

Solicitors for respondent: *Watkins and Hunter.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

K. V. Srinivasathathachar .. *Appellant* (Petitioner 2nd Plaintiff)*

v.

Naravalur Srinivasathathachar .. *Respondent (Respondent-Defendant).*

Srinivasa-thathachar *v.* Srinivasa-thathachar.

Civil Procedure Code (V of 1908), S. 54—Applicability—Partition of share in portion of estate—Partition if need be of land and revenue.

S. 54 of the Code of Civil Procedure applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to Government. It does not apply where the decree is for separate possession of a share of a portion of an undivided estate.

Moulvi Abdul Razak v. *Sreenath Ghose*, (1930) I. L. R. 58 Cal. 122, relied on.

Per *Venkatasubba Rao, J.*—What S. 54 of the Code refers to is the partition of the estate assessed to the payment of revenue and not the partition of the estate as well as the revenue.

Appeal against the order of the Court of the Subordinate Judge of Salem, dated 14th November, 1930 and made in I. A. No. 269 of 1928 in O. S. No. 62 of 1926.

C. S. Venkatachariar for appellant.

B. Sitarama Rao for respondent.

The Court delivered the following

Venkata-subba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—The question raised relates to the construction of S. 54, Civil Procedure Code. The Lower Court has made an order directing the decree to be forwarded to the Collector for partition being effected. Mr. Venkatachari for the appellant contends that the order is wrong. It is first urged that the section does not apply unless the partition is not only of the land but also of the revenue assessed on it ; in other words, unless the division of the land is to be followed by the apportionment of the revenue. This construction is opposed to the plain provisions of the section. What the section refers to is, the partition of the estate *assessed to the payment of revenue* and not the partition of the estate *as well as* the revenue. Why in construing the section, which is plain and unambiguous, words not to be found there should be imported into it, I fail to see. I agree with the observations of Rankin, C. J., on this point in the two cases cited at the bar,

*A. A. O. No. 112 of 1931. 26th August, 1932.

Srinivasa-thathachar v. Srinivasa-thathachar.

Venkata-subba Rao, J.

namely, *Moulvi Abdul Razak* v. *Sreenath Ghose*[1] and *Rai Kiran Chandra Roy Bahadur* v. *Rama Nath Dutta Chowdhury*[2]. But it is unnecessary to pursue this point, as the second contention of Mr. Venkatachari is, in my opinion, clearly well founded. He argues that what the section contemplates is an *entire* undivided estate and not merely *a part* of it. In the present case, the plaintiff and the defendant were entitled to *a portion* of the undivided estate and the decree directed that that portion should be divided into two equal halves. Such a decree does not fall within the terms of the section. Is this decree one for the partition of an undivided estate ? Or again, is it for the separate possession of a share of such an estate ? The answer is in the negative. A share of an estate is not equivalent to a share of a portion of an estate ; when the decree relates to the separate possession of *a share of a portion*, that decree does not fall within the terms of the section. Trevelyan, J., expresses this tersely in *Jogodishury Debea* v. *Kailash Chundra Lahiry*[3], in a passage extracted by Rankin, C. J., in the first of the two cases already cited. Says Mr. Justice Trevelyan :

> " The section applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to Government. A decree for possession of a share of a portion of an undivided estate is not a decree for ' possession of a share of an undivided estate' in any sense."

The intention of the statute seems to be, that where the duty is cast upon the Collector of executing the decree, the partition he has to effect is to be both complete and perfect, that is, not only is the land to be divided, but the revenue also is to be allocated, the object being that the interests of the Government are safeguarded and there is also a final adjudication of the rights and liabilities of the parties in the sense, that one sharer shall no longer be at the mercy of the other co-owners; and such a course the Collector can appropriately adopt only when the decree relates to the whole, and not merely a part of, the undivided estate and all the parties interested and to be affected by the proposed division, are before him.

I agree with the view taken of the section by the learned Judges of the Calcutta High Court in *Moulvi Abdul Razak* v. *Sreenath Ghose*[1] and *Rai Kiran Chandra Roy Bahadur* v.

1. (1930) I. L. R. 58 Cal. 122 : 34 C. W. N. 892 at 894.
2. (1930) 34 C. W. N. 895. 3. (1897) I. L. R. 24 Cal. 725 (F. B.).

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Venkatasubba Rao, J.

Rama Nath Dutta Chowdhury[1] referred to by me. The result is, the Subordinate Judge's order is set aside and the appeal is allowed with costs.

I must point out that there was some difficulty in the Lower Court as regards getting a proper officer appointed for effecting the partition. The Commissioner selected reported that without the aid of an expert Surveyor he was unable to make a partition. We direct the Court to appoint a fresh Commissioner and would suggest that, if possible, a trained Surveyor should be appointed.

Reilly, J.

Reilly, J.—It appears in this case that the agraharamdars of this village in 1876 by an arrangement among themselves allotted certain plots of land in the village to each other to be enjoyed separately in accordance with their *vrithis*, reserving, we are told, certain other plots still to be enjoyed in common. In course of time plots of land representing about 7/9ths of the whole village, we are told, came into the possession of the Plaintiff and the Defendant in this suit. The suit is for the partition of those plots between the Plaintiff and the Defendant. It appears to me quite clear that such a suit does not come within the meaning of S. 54 of the Code. It is certainly not a suit for the partition of an undivided estate within the words of the section. It is not a suit for the partition of the whole agraharam village. Nor is it a suit for the separate possession of a share of that village. If it were a suit for the separate possession of a share of that village, not only would the Plaintiff and the Defendant be parties, but all the agraharamdars would have to be parties to the suit. Here we are quite outside the provisions of S. 54 of the Code, as I understand them. Perhaps I may also say with respect that I entirely agree with the interpretation of S. 54 of the Code given by Rankin, C. J. in *Moulvi Abdul Razak* v. *Sreenath Ghose*[2].

I agree that this appeal should be allowed with costs and that the Revision Petition should be dismissed but without costs.

B.V.V.

Appeal allowed.
Revision Petition dismissed.

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1. (1930) 34 C. W. N. 895.
2. (1930) I. L. R. 58 Cal. 122.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Muthukumara Sthapathiar .. *Appellant** (*Respondent-Pl intiff*)

v.

Sivanarayana Pillai (deceased) and another .. *Respondents* (*Appellant and his L. R.—Defendant*).

Muthukumara Sthapathiar *v.* Sivanarayana Pillai.

Hindu Law—Joint family—Alienee of share of coparcener—Suit for partition—Mode of determining right to property.

Where an alienee from a Hindu coparcener sues the other members of the family for partition, the alienee's right to the property must be worked out as on the date of his suit for partition and not as on the date of the alienation in his favour.

Rangasami v. *Krishnayyan*, (1891) I. L. R. 14 Mad. 408: 1 M. L. J. 603 (F. B.), relied on.

Chinnu Pillai v. *Kalimuthu Chetti*, (1911) I. L R. 35 Mad. 47: 21 M. L. J. 246 (F. B.), discussed.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Devadoss in E. A. No. 255 of 1924 preferred against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in A. S. No. 171 of 1923 (A. S. No. 1256 of 1922, District Court of Tinnevelly) preferred against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 420 of 1920.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for appellant.

T. M. Ramaswami Aiyar for respondents.

The Court delivered the following

Jackson, J.

JUDGMENTS. *Jackson, J.*—The facts are set forth in the judgment under appeal and need not be re-stated in detail.

The defendant is alienee from a brother in a Hindu joint family and by virtue of the alienation defendant got into possession of a certain parcel of land. The rest of the joint family property was dissipated, and then plaintiff, the other brother, sued for partition of this parcel. The District Munsif dismissed his suit. The Subordinate Judge decreed him a moiety. A single Judge of this Court again dismissed the suit, and plaintiff appeals under the Letters Patent.

The parties agree that at the time of the alienation the defendant purchased the right to compel partition of the brother's

*L. P. Appeal No. 29 of 1927. 20th September, 1932.

share as it then stood. The plaintiff reads this as meaning that one-half was purchased, and from the property existing at the time of the partition suit defendant can take that half. The defendant would read into it something more, that he purchased not only the right to the fractional share, but the right to divide the family property as it stood on the date of alienation. Put mathematically, it may be said that plaintiff concedes that defendant has $\frac{1}{4}$, and defendant claims $\frac{1}{2}$

It is a question which, as the authorities abundantly show, cannot be decided by pure law or logic.

That alienations of a coparcener's share are inconsistent with Hindu Law is laid down by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[1], referred to by Arnold White, C. J., in *Chinnu Pillai* v. *Kalimuthu Chetti*[2] and Sankaran Nair, J., on page 56.

But it was held that in equity a person who had parted with his money should receive something in exchange, and therefore in *Deendyal Lal* v. *Jugdeep Narain Singh*[3] the alienee was given a right limited to compelling the partition which his debtor might have compelled had he been so minded before the alienation of his share took place.

In *Hardi Narain Sahu* v. *Ruder Perkash Misser*[4] the Privy Council interprets this in the sense that "only that passed which the father, the person against whom the decree was obtained, had". A very natural proposition, if one may say so, that a man cannot sell more than he has got, "not the share in the property, but the right which the father would have to a partition".

Of course this right to a partition terminates upon death; and a coparcener always holds the right subject to this contingency. So, if the decree-holder literally bought only what his vendor had, he bought the right of partition subject to this contingency; and when his vendor died, he would have no right at all.

That seems to be hard logic, and in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[1] the alienee was allowed the right even after the death of the alienor. "In Madras," the Privy Council

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1. (1879) L. R. 6 I. A. 88: I. L. R. 5 Cal. 148 at 166 (P. C.).
2. (1911) I. L. R. 35 Mad. 47 at 51: 21 M. L. J. 246 (F. B.).
3. (1877) L. R. 4 I. A. 247: I. L. R. 3 Cal. 198 at 209 (P. C.).
4. (1883) L. R. 11 I. A. 26: I. L. R. 10 Cal. 626 at 635-636 (P. C.).

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observes on p. 173, " the mortgage executed by the alienor in his 'lifetime' might operate after his death as a valid charge," and in the Bengal case under consideration it holds that the execution proceedings had gone so far as to constitute a valid charge which could not be defeated by death before the actual sale.

If this is so, it is a clear departure from the dictum that an alienor could only sell what he had. He had a right subject to the contingency of death, and he sold a right not subject to the contingency of his death.

This difficulty was pressed upon the referring Judges in *Rangasami* v. *Krishnayyan*[1] and they thought that in logic the alienee would be subject to all contingencies, such as births diminishing his alienor's share and his alienor's death obliterating that share. They referred to a Full Bench the question " to what share in the property is the plaintiff entitled ". The Full Bench held that the purchaser takes an uncertain and fluctuating interest. It did not decide what would be the effect of death, but observed *obiter* that because the interests carved out at the sale vest in the purchaser at once, the subsequent death of the vendee cannot divest the interest which has once vested. On this line of reasoning the other subsequent contingencies, such as births into the coparcenary might, it may be thought, have been treated as not affecting the vested interest; however the Full Bench held that the alienated share is affected by subsequent births, and is to be reckoned with reference to the joint family as it stands at the time of the suit for partition and not as it stood at the time of alienation.

In *Hardi Narain Sahu* v. *Ruder Perkash Misser*[2] the family consisted of father, mother, and minor son. The father alienated his share and then made over his interest to his son who sued the alienee for possession.

The Calcutta High Court treating it as a suit for partition decreed that the minor, the mother, and the father's alienee should each have one-third. The alienee appealed claiming a half. It is not quite clear upon what he based this plea but apparently (p. 633) Mr. Doyne on his behalf while conceding that the mother would in Bengal be entitled to one-third on partition, argued that before partition she only had a mainten-

1. (1891) I. L. R. 14 Mad. 408 at 410: 1 M. L. J. 603 (F. B.).
2. (1883) L. R. 11 I. A. 26: I. L. R. 10 Cal. 626 (P. C.).

ance right, and probably claimed that the alienee had carved out interests at the sale which would vest in him at once, the language of the *obiter* upon death in the Madras Full Bench case. The Privy Council quoted (pp. 635-6) the passage already cited from *Deendyal Lal* v. *Jugdeep Narain Singh*[1], "only that passed which the father had" and also quoted "so long as Bhagwa lived the alienee had an interest in the property which entitled him to demand a partition," and it then proceeds, "the interest which is purchased is not, as Mr. Doyne argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. Doyne's argument that the father was entitled to a half".

Then it seems to have been suggested that in any case the Calcutta High Court did wrong to decree partition, and the rights of a second son who had been born into the family should be considered. The Privy Council agreed that the decree was not proper; but the person appealing was the alienee, not the minor, and as the decree for partition gave him a more favourable decree than he may have been entitled to, and as no one was urging that he should have less than what the decree gave him (there was no cross-appeal) there was no ground for altering it.

The question whether the alienee's suit was maintainable after the alienor's death came directly before our Court in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[2]: Davies, J., was inclined to follow *Rangasami* v. *Krishnayyan*[3] to its logical conclusion, holding that death was a contingency operating on the purchaser's fluctuating interest; Benson, J., thought that the point was decided by authority. They referred the question whether the suit was maintainable to a Full Bench. Arnold White, C. J., and Moore, J., agreed with Benson, J., that there was authority for an affirmative answer, and preferred simply *stare decisis*. Bhashyam Aiyangar, J., took the opportunity to traverse the whole question, and expressed the opinion that *Rangasami* v. *Krishnayyan*[3] was wrongly decided.

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1. (1877) L. R. 4 I. A. 247: I. L. R. 3 Cal. 198 (P. C.).
2. (1902) I. L. R. 25 Mad. 690 (F. B.).
3. (1891) I. L. R. 14 Mad. 408: 1 M. L. J. 603 (F. B.).

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He quotes (p. 705) the definition of the alienee's right in *Deendyal Lal* v. *Jugdeep Narain Singh*[1], which has also been quoted above, and puts into his own italics the words "before the alienation of his share takes place". There does not seem to be any warrant for this special emphasis. In this case there was no question of fluctuating interest, and the sentence might have stopped with "compelling the partition which his debtor might have compelled" without injury to its sense. Even if "before the alienation of his share" has special significance, which I doubt, at most it is a mere *obiter* on a question not discussed in the case, and upon which it would be most dangerous to build.

Bhashyam Aiyangar, J., next discusses *Suraj Bunsi Koer* v. *Sheo Persad Singh*[2], and then *Hardi Narain Sahu* v. *Ruder Perkash Misser*[3], which he summarises in this manner (p. 709):

> "During the pendency of the suit another son was born to the judgment-debtor and it was contended before the High Court that a share should be allotted to such son also. The High Court overruled this contention . . . The case was carried in appeal to the Privy Council by the purchaser . . . the decision of the Privy Council proceeds on the footing that neither the birth of the second son nor the death of the mother affected the share to which the purchaser became entitled."

As I have shown above the Privy Council so far from making this the footing or basis of its decision, absolutely declined to go into the matter.

Lastly, Bhashyam Aiyangar, J., notices *Madho Parshad* v. *Mehrban Singh*[4], where the Judicial Committee ruled in unequivocal terms that the death of the alienor Zalim renders it impossible to order partition and charge his divided share with the money paid him by the alienee. But this was distinguished by the Full Bench as referring only to the Mitakshara Law obtaining in Oudh.

Then on p. 713 Bhashyam Aiyangar, J., gives it as his opinion that the actual decision in *Rangasami* v. *Krishnayyan*[5] "is opposed to the principle on which the above decisions of the Privy Council proceed".

But, as pointed out above, *Deendyal Lal* v. *Jugdeep Narain Singh*[1] is only applicable if emphasis is given to special

1. (1877) L. R. 4 I. A. 247: I. L. R. 3 Cal. 198 at 209 (P. C.).
2. (1879) L. R. 6 I. A. 88: I. L. R. 5 Cal. 148 (P. C.).
3. (1883) L. R. 11 I. A. 26: I. L. R. 10 Cal. 626 (P. C.).
4. (1890) L. R. 17 I. A. 194: I. L. R. 18 Cal. 157 (P. C.).
5. (1891) I. L. R. 14 Mad. 408: 1 M. L. J. 603 (F. B.).

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words, and *Hardi Narain Sahu* v. *Ruder Perkash Misser*[1] is not applicable at all. If *Suraj Bunsi Koer* v *Sheo Persad Singh*[2] is authority for the proposition that death does not affect the alienee's right, that proposition is not founded there on any principle, but emphasis rather is laid on the peculiar circumstances of that case where execution had proceeded almost up to sale.

However, when the question of fluctuation came directly before the referring Judges in *Chinnu Pillai* v. *Kalimuthu Chetti*[3] they declined to accept the authority of *Rangasami* v. *Krishnayyan*[4], and, thinking that the doubts entertained by Bhashyam Aiyangar, J., were well founded, they referred to a Full Bench the question, whether the mortgagee of a Hindu is entitled to proceed against the share of a son subsequently born, in family property mortgaged by him. A Bench of five Judges was constituted so that, if necessary, it might overrule the Bench of four which decided *Rangasami* v. *Krishnayyan*[4]. But unfortunately one of these five dropped out and the Bench as finally constituted only contained four.

Sir Arnold White, C. J., quotes (p. 52) with approval the view of the referring Judges in *Rangasami* v. *Krishnayyan*[4] but says that it is a position which the Full Bench declined to accept. But as he shows immediately afterwards the Full Bench did accept the position so far as to rule that the purchaser takes an uncertain and fluctuating interest. What they did was to modify this rule by suggesting *obiter* two exceptions: where the fluctuation has worked out to the benefit of the alienee by his alienor's share increasing on the death of other members of the coparcenary, and where the share might seem to be obliterated by the alienor's death.

The learned Chief Justice then points out, as I have observed above, that the argument for excepting death might serve to except any fluctuation. He next refers to *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[5] which settled, for this presidency, that death is an exception, and concludes:

"It seems to me that when once it is held that the death of the alienor does not create any right of survivorship to the other coparceners, it follows

1. (1883) L. R. 11 I. A. 26: I. L. R. 10 Cal. 626 (P. C.).
2. (1879) L. R. 6 I. A. 88: I. L. R. 5 Cal. 148 (P. C.).
3. (1911) I. L. R. 35 Mad. 47: 21 M. L. J. 246 (F. B.).
4. (1891) I. L. R. 14 Mad. 408: 1 M. L. J. 603 (F. B.).
5. (1902) I. L. R. 25 Mad. 690 (F. B.).

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almost as a necessary corollary that the quantum of interest which vests in the alienee is not affected by subsequent changes in the number of coparceners."

This is good logic; but it is equally good logic to say that if the alienor only sells what he has got and no more, it follows as a necessary corollary that the interest of the alienee fluctuates. We start with the principle "only that passed which the alienor had". We recognize an arbitrary exception that death does not diminish the alienee's right; then we make the exception itself the principle, and turning round at that point, conclude that something passed which the alienor had not got. A vicious circle. Either view is rational, but it is impossible to pick out one of them as exclusively based either on law or on logic.

Benson, J., accepted and treated as the principal part of his judgment the description of *Hardi Narain Sahu* v. *Ruder Perkash Misser*[1] given by Bhashyam Aiyangar, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[2].

Munro, J., confined himself to a simple affirmative. Sankaran Nair, J., pointed out that in sheer logic if one fluctuation such as death could not affect the alienee's right, then no fluctuation would affect it. The question was not dependent on Hindu Law. In equity *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[2] should be approved, and in equity the alienee should not be given more than he had at the time of the alienation. It is more consistent with equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of alienation rather than that he gets a fluctuating share and he reaches the same conclusion as I have reached, that there is no final decision on the point to be found in the Privy Council cases. So it is held by this Bench that the alienee's share does not fluctuate, but is to be reckoned as from the date of the alienation. Four Judges therefore have held that the share does, and four have held that it does not fluctuate.

In this state of the law the respondent contends that *Chinnu Pillai* v. *Kalimuthu Chetti*[3] and *Ramasami Aiyar* v. *Venkatarama Aiyar*[4] authorize him to work out a partition as on the date of the alienation. *Ramasami Aiyar* v. *Venkata-*

1. (1883) L. R. 11 I. A. 26: I. L. R. 10 Cal 626 (P. C).
2. (1902) I. L. R. 25 Mad. 690 (F. B.).
3. (1911) I. L. R. 35 Mad. 47: 21 M. L. J. 246 (F. B.).
4. (1923) I. L. R. 46 Mad. 815: 45 M. L. J. 203.

Muthu-kumara Sthapathiar v. Siva-narayana Pillai.

Jackson, J.

rama Aiyar[1] merely makes what was condoned in *Hardi Narain Sahu* v. *Ruder Perkash Misser*[2] a rule of practice, allowing Courts to decree partition in a suit for recovery of possession; and has no bearing upon the theoretical problem.

The appellant relies upon *Manjaya Mudali* v. *Shanmuga Mudali*[3] where the recognized law is clearly stated, and Bakewell, J., points out that the right of the alienee is *in personam* and not *in rem*. This judgment would have afforded useful material for answering Mr. Doyne in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[4] and meets the theory that the share is something more material than a mere fraction.

In *Subba Goundan* v. *Krishnamachari*[5] it is held that a purchaser has only an equity as against the other members of the coparcenary to work out his interests by a suit for general partition. It is not suggested that his equity extends to working out a partition as from the date of the alienation; nor indeed do I find this suggested anywhere except in the judgment under appeal. Mr. Justice Devadoss thinks it well settled by *Chinnu Pillai* v. *Kalimuthu Chetti*[6] that the time at which the share of the alienating brother should be determined is the date of the alienation. I agree so far as the bare amount of the share, the fraction, is concerned. But in that case it was never considered that the hotchpot should be taken as that which existed on the date of alienation. That question was never raised. Then his Lordship cites *Ramasami Aiyar* v. *Venkatarama Aiyar*[1] without showing it to have greater import than I have found it to have. So that in effect this judgment is simply based upon what the learned Judge thinks would be equitable, and considering the state of the law, no other basis is possible.

It remains for us to see if we agree with this view of equity.

In my opinion the most equitable and logical view of this vexed question is that the alienor cannot part with more than he has got; that is a basic principle which I can understand, and I should have been quite prepared to hold that as the right of

1. (1923) I. L. R. 46 Mad. 815: 45 M. L. J. 203.
2. (1883) L. R. 11 I. A. 26: I. L. R. 10 Cal. 626 (P. C.).
3. (1913) I. L. R. 38 Mad. 684: 26 M. L. J. 576.
4. (1879) L. R. 6 I. A. 88: I. L. R. 5 Cal. 148 (P. C.).
5. (1921) I. L. R. 45 Mad. 449 at 460: 42 M. L. J. 372.
6. (1911) I. L. R. 35 M. 47: 21 M. L. J. 246 (F. B.).

Muthukumara Sthapathiar v. Sivanarayana Pillai.

Jackson, J.

the alienor becomes extinct upon his death, the right of the alienee becomes extinct also. However the contrary opinion is founded upon a long series of cases and I agree with the Full Bench in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[1] that even at that date it was too late to think of upsetting it.

So the contingency of death stands as an arbitrary exception to the rule that the right is fluctuating.

But I see no reason to import other exceptions, and prefer the decision of the four Judges in *Rangaswami* v. *Krishnayyan*[2] to the decision of the four Judges in *Chinnu Pillai* v. *Kalimuthu Chetti*[3]. The former decision is logical, and quite equitable, for the alienee has only himself to thank if by delaying his right to compel partition he finds his security diminished.

Holding this view I find no basis for the proposition that when he does compel partition the alienee's right to the property must be worked out as from the date of the alienation. And even if I agreed with *Chinnu Pillai* v. *Kalimuthu Chetti*[3] that the *share* ceases to fluctuate from the date of alienation, I should not be prepared to go further and say that there must be a hotchpot hooked to the same date. Such a theory would be very cumbersome to work out in practice, for the Court might have to take into account transactions which had long passed beyond the memory of the parties. It is troublesome enough dealing with the present day actualities of a partition suit. I therefore hold that the appellant is entitled to take the family property as existing on the date of his suit.

This restores the decree of the Subordinate Judge and the appeal is allowed with costs of both appeals in this Court.

Mockett, J.

Mockett, J.—I entirely agree.

I would only add that on a close examination of the cases cited there does not appear to be an exact authority covering the point which we have had to consider.

I concur with the view of my learned brother that equity is best served by taking the property of the family as it stands at the date of the partition suit.

B. V. V. *Appeal allowed.*

1. (1902) I. L. R. 25 Mad. 690 (F. B.).
2. (1891) I. L. R. 14 Mad. 408: 1 M. L. J. 603 (F. B.).
3. (1911) I. L. R. 35 Mad. 47: 21 M. L. J. 246 (F. B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

Vasireddi Ramayya and others .. *Appellants** (*2nd Petitioner and 1st Petitioner's L. Rs.*)

v.

Mulugu Kotayya and others .. *Respondents* (*Respondents*).

Limitation Act (IX of 1908), Art. 182 (3)—Review of decree—Parties not impleaded in review proceeding—Application for execution—Time limit—Date of review as starting point. Ramayya. *v.* Kotayya.

Where there has been a review of a decree the period of limitation for purposes of Art. 182 (3), Limitation Act, should be taken to run from the date of the review, notwithstanding that the persons against whom time is reckoned were not parties to the review proceeding.

Nagendra Nath Dey v. *Suresh Chandra Dey,* (1932) L. R. 59 I. A. 283: 63 M. L. J. 329 (P. C.), relied on.

Appeal against the order of the Court of the Subordinate Judge of Bapatla, dated the 14th March, 1929 and made in E.P. No. 193 of 1928 in O.S. No. 13 of 1913 on the file of the Court of the Additional Subordinate Judge of Guntur.

P. Somasundaram for appellants.

B. Somayya for respondents.

The judgment of the Court was delivered by

Mockett, J.—The decree sought to be executed is dated 16th February, 1914. The Petitioners (Appellants) petitioned to execute it against Defendants 4, 18 and 42 (Respondents 1, 2 and 3) in respect of mesne profits and for possession of a plot of land. Mockett, J.

The decree was joint and several against all the defendants.

The defendants appealed to the High Court against the above decree and the appeal was dismissed on 29th March, 1916. On 18th January, 1917, the High Court reviewed the decree at the instance of Defendants 19, 21 and 22 and limited their liability to certain items. The Respondents were not made parties to the review application.

In the present execution petition the appellants give the "date of decree" as "Date of amended Decree 18th January,

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*A. A. O. No. 22 of 1930. 20th September, 1932.

Ramayya v. Kotayya.

Mockett, J.

1917". They now appeal against the order in execution in so far as the learned Subordinate Judge has held that subsequent profits for the years 1910 to 1919 are not recoverable in execution as no final decree has been passed in respect thereof.

We think that this construction of the decree is clearly wrong and Mr. Somayya for the 2nd Respondent does not argue otherwise.

There is however a Memorandum of Objections which raises a point which if sound goes to the root of the whole matter. Mr. Somayya argues that limitation should run not from the date of the review order but from the date of the original decree. If he is right this execution petition is time-barred. The basis of his argument is that inasmuch as the Respondents were not parties to the review application their legal rights cannot be affected by an *ex parte* order, that is, that a fresh period of limitation cannot be created by an order in their absence. Article 182 (3), Limitation Act, is *prima facie* against this contention—the words "where there has been a review" are not limited or qualified.

The cases cited do not in our view support this contention. *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao*[1], it was urged, is an authority in its favour, but this case was decided on the ground that the High Court acted *ultra vires* and that such an order could not prejudice absent parties who could therefore rightly claim that the original decree was intact. *Abdul Khadir* v. *Ahammad Shaiwa Ravuthar*[2] is a case of fraud by one judgment-debtor being invoked to extend time against an innocent co-defendant. This position was not acceptable to the Full Bench who preferred the view of Sundaram Aiyar, J., to that of Phillips, J., in *Abdul Khadir* v. *Ahammad Shaiwa Ravuthar*[3], the subject of the Full Bench decision. In that case Sundaram Aiyar, J., at p. 675 observes:

> "No doubt, where an appeal has been preferred against a decree or the decree has been amended or judgment reviewed, time would run for execution only from the date of the final or revised decree, though not all the judgment-debtors may be concerned in the appeal, review or amendment."

The learned Judge then proceeds to distinguish the special consideration applicable to fraud under S. 48 of the Code of

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1. (1900) L. R. 27 I. A. 197: I. L. R. 24 Mad. 1 (P. C.).
2. (1913) I. L. R. 38 Mad. 419 (F. B.)
3. (1911) I. L. R. 35 Mad. 670: 22 M. L. J. 35.

Ramayya v. Kotayya.

Mockett, J.

Civil Procedure. The respondent is therefore asking us to apply to Art. 182 a restricted meaning for which there is no authority. On the other hand the recent decision of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*[1] is strongly opposed to the Respondents' case. Their Lordships dealing with Art. 182 (2) express the following view:

"There is no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it—the words mean just what they say."

If Mr. Somayya's argument was accepted by us we should have to read into Art. 182 (3) an elaborate proviso protecting persons not parties to the review, that is, a qualification as to parties which is precisely what the above judgment prohibits.

We consider that the plain wording of Art. 182 (3) must be followed and as there has been a review, time will run from the date of the review.

The result of the above conclusions is that the Appeal Against Order No. 22 of 1930 must be allowed and the Memorandum of Objections disallowed with costs throughout.

Appeal allowed.

B. V. V. *Memorandum of Objections dismissed.*

PRIVY COUNCIL.

[Petition for special leave to appeal from the High Court of Judicature at Lahore.]

PRESENT:—VISCOUNT DUNEDIN, LORD TOMLIN, LORD THANKERTON, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Mohindar Singh and another .. *Appellants**

v.

The King-Emperor .. *Respondent.*

P. C.

Mohindar Singh v. The King-Emperor.

Privy Council—Practice—Criminal case—Interference in—Ground for —Evidence Act, S. 30—Erroneous reading of.

The Judicial Committee of the Privy Council does not sit as a Court of Criminal Appeal. Their Lordships will interfere with a criminal sentence only where there has been something so irregular or so outrageous as to shock the very basis of justice. In re *Abraham Mallory Dillet*, (1887) 12 A. C. 459, followed.

The petitioners contended that the Courts in India, on a wrong view of S. 30 of the Indian Evidence Act, admitted as substantive evidence against them the retracted confession of a co-accused tried jointly with them, and that, apart from such confession, there was an insufficiency of evidence to warrant their conviction.

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* 5th April, 1932.

1. (1932) L. R. 59 I. A. 283: 63 M. L. J. 329 (P. C.).

P. C.

Mohindar Singh v. The King-Emperor.

Held, rejecting their petition for special leave to appeal, that these were merely points for a Court of Criminal Appeal.

The petitioners desired to obtain special leave to appeal from the judgment of the High Court, Lahore, dated the 7th December, 1931, which affirmed a judgment of the Sessions Judge of Ferozepore, dated the 30th March, 1931, convicting the 1st petitioner of conspiracy to murder and murder and the 2nd petitioner of conspiracy to murder and sentencing the 1st petitioner to death and the 2nd petitioner to transportation for life.

The petitioners were put on trial jointly with one Jagir Singh and three others. The co-accused Jagir Singh retracted before the Committing Magistrate a confession previously made by him and which was duly recorded by the Additional District Magistrate under S. 164 of the Criminal Procedure Code. In his confession Jagir Singh gave particulars of his meetings with the petitioners and of the inducement offered to him by them to murder the deceased, and details regarding the murder.

Both the Sessions Judge and the High Court treated the confession of Jagir Singh as the principal evidence against all the accused, including the petitioners. They held that the confession was not rendered inadmissible by the subsequent retraction, following in this respect the ruling reported in *Partab Singh* v. *The Crown*[1]. They further held that the confession was corroborated by independent and reliable evidence implicating the petitioners.

Pritt, K. C. and *Sydney Smith* for petitioners.—The Indian Evidence Act, S. 30, did not justify the Courts in treating the retracted confession of Jagir Singh as substantive evidence as against the present petitioners. The section merely says that the confession "may be taken into consideration" by the Court. Eliminating the confession there was no other evidence to sustain the petitioners' conviction. The Board will interfere where there has been a violation of natural justice: *Vaithinatha Pillai* v. *King-Emperor*[2].

Dunne, K. C. and *Wallach* for Crown.

5th April, 1932. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—Their Lordships have frequently stated that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis

1. (1925) I. L. R. 6 Lah. 415.
2. (1913) L. R. 40 I. A. 193 : I. L. R. 36 Mad. 501 : 25 M. L. J. 518 (P.C.).

P. C.

Mohindar Singh v. The King-Emperor.

Viscount Dunedin.

of justice. Such an instance was found in *Dillet's case*[1], which has always been held to be the leading authority on such matters.

In the present case the only real point is as to the meaning and effect of a section of the Evidence Act. The petitioners contended that a wrong view had been taken of the matter, also that upon a proper reading of the section there was an insufficiency of evidence to warrant the conviction. Those are merely points for a Court of Criminal Appeal.

Their Lordships will humbly advise His Majesty that the petition should be dismissed.

Solicitors for petitioners: *H. S. L. Polak & Co.*

Solicitors for respondent: *Solicitor, India Office.*

K. J. R. *Petition for special leave rejected.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Alapati Achutaramanna .. *Petitioner* (Plaintiff)*

v.

Vasireddi Jagannadham and another .. *Respondents (Defendants).*

Achutaramanna v. Jagannadham.

Promissory note—Insufficiently stamped—Independent cause of action apart from the note—Admission in written statement—Whether further proof necessary—S. 58, Evidence Act, applicable.

If a plaintiff has an independent cause of action apart from the promissory note executed in his favour and insufficiently stamped, the admission of the loan in the written statement is under S. 58 of the Indian Evidence Act sufficient to waive the requirements of further proof and to enable the plaintiff to succeed thereon. But if there is no such cause of action, the mere admission of the fact by the defendant could not give him a cause of action and that is not a matter cured by S. 58 or any other section of the Indian Evidence Act.

Pramatha Nath Sandal v. *Dwarka Nath Dey*, (1896) I. L. R. 23 Cal. 851, applied.

Muthu Sastrigal v. *Viswanatha Pandara Sannadhi*, (1913) I. L. R. 38 Mad. 660: 26 M. L. J. 19; *Alimane Sahiba* v. *Subbarayudu*, (1932) 63 M. L. J. 303; *Chenbasappa* v. *Lakshman Ramchandra*, (1893) I. L. R. 18 Bom. 369; *Pothi Reddi* v. *Velayuda Sivan*, (1887) I. L. R. 10 Mad. 94 and *Sheik Akbar* v. *Sheik Khan*, (1881) I. L. R. 7 Cal. 256, referred to.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the District Court of West

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* C. R. P. No. 1098 of 1929. 16th September, 1932.

1. (1887) 12 A. C. 459.

Achuta-ramanna *v.* Jaganna-dham.

Godavari at Ellore in A. S. No. 180 of 1928 preferred against the decree of the Court of the District Munsif of Kovvur in O. S. No. 96 of 1927.

K. Venkatarama Raju for petitioner.

V. Govindarajachari for respondents.

The Court delivered the following

JUDGMENT.—The petitioner's suit for Rs. 400 and interest thereon was dismissed by the learned District Judge of West Godavari on the ground that the promissory note sued on was inadmissible in evidence as it bore only one anna stamp instead of two annas stamp and that the plaintiff's case which he attempted to make by amendment of the plaint that the loan was given some eight days before the note was not in fact true. Consequently, according to the learned Judge, the loan and the note being contemporaneous, the suit for the loan was not maintainable because the note was inadmissible, vide *Muthu Sastrigal* v. *Viswanatha Pandara Sannadhi*[1].

In this Court, it is contended for the petitioner that the learned Judge failed to see that both the note and the loan were admitted by the respondent-defendant in his written statement and that consequently by S. 58 of the Indian Evidence Act it was not necessary for the plaintiff-petitioner to prove either the note or the loan. The written statement of the defendant does contain an express admission of the execution of the promissory note as well as an implied admission of the receipt of the loan. The petitioner's contention is that in such cases no question of admissibility of evidence arises because evidence is dispensed with of facts admitted in the pleadings. For the application of that doctrine to this class of cases reliance is placed upon the decision of Anantakrishna Aiyar, J., in *Alimane Sahiba* v. *Subbarayudu*[2]. In that case, in a suit on a promissory note the defendant in his pleadings admitted execution of the note but pleaded discharge of the note. The note was produced in evidence and marked apparently without question but later on the defendant discovered that the stamp on the note had not been cancelled and he then raised the question that the note was invalid by S. 12 of the Stamp Act. The learned Judge on those facts held that S. 58 of the Indian Evidence Act applied, and, therefore, no question of admissibility of the note arose at all.

1. (1913) I. L. R. 38 Mad. 660: 26 M. L. J. 19.
2. (1932) 63 M. L. J. 303 at 308.

Achuta-ramanna v. Jaganna-dham.

In that sense the note sued on in this case was admitted and no question of admissibility therefore arose. But it is answered that the learned Judge in *Alimane Sahiba* v. *Subbarayudu*[1] did not consider the effect of the language of S. 35 of the Stamp Act which says not merely that unstamped instruments must not be received in evidence but that they must not be acted upon. It was urged that on the latter part of this language it has been held in *Chenbasapa* v. *Lakshman Ramchandra*[2], following the decisions of the Calcutta High Court, that in spite of waiver of proof by an admission under S. 58 of the Indian Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it. I have not been referred to anything to contradict this and I must therefore hold that so far as admission of the inadmissible note is concerned, S. 58 of the Indian Evidence Act does not avail the petitioner, for in respect of it no decree can be given on the note as, to do so, would be acting upon the note.

But the petitioner has still another string to his bow, and that is the admission of the loan. It is said that by reason of that admission, to which no prohibition under the Stamp Act can apply, proof by the plaintiff of the fact of the loan being waived, he is entitled to a decree because the decision in *Muthu Sastrigal* v. *Viswanatha Pandara Sannadhi*[3] relied upon by the Lower Court for refusing to give a decree for the loan is based upon the inadmissibility of the proof of a loan which is contemporaneous with an inadmissible note by S. 91 of the Evidence Act. Where, therefore, there is no question of proof, S. 91 does not come into play at all. To this the respondent's answer is that the prohibition of a decree on a loan which is contemporaneous with an inadmissible note is not due merely to the difficulty of proof created by S. 91 of the Indian Evidence Act but something more fundamental, namely, absence of any cause of action independent of the note. In brief, the respondent's answer is that where there is a loan and a contemporaneous promissory note which is inadmissible for want of proper stamp there is no cause of action for the loan independently of the note.

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1. (1932) 63 M. L. J. 303.
2. (1893) I. L. R. 18 Bom. 369.
3. (1913) I. L. R. 38 Mad. 660: 26 M. L. J. 19.

Achutā-rāmanna *v.* Jaganna-dham.

I am not able to say, though there are stray expressions in the judgment of Sadasiva Aiyar, J., in *Muthu Sastrigal* v. *Viswanatha Pandara Sannadhi*[1] capable of that meaning, that this was the real ground of his decision. On the contrary, he does expressly refer at p. 663 to the ground of the decision in these words:—

"To import the doctrines laid down in English cases about vague obligations to repay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify S. 91 of the Indian Evidence Act."

And Spencer, J., says practically the same thing. In the decision which was relied upon in that case, *Pothi Reddi* v. *Velayuda Sivan*[2], the matter is put in similar language at p. 97. There money had been paid in the morning and in the evening a document which was held to be a promissory note and not properly stamped was exchanged. It being held that the instrument was a promissory note the question arose whether the plaintiff might be permitted to prove and succeed on the loan. The learned Judges say:

"We cannot assent to such a doctrine, and to do so would entirely nullify the provisions of S. 91 of the Indian Evidence Act."

And later

"It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of S. 91 of the Indian Evidence Act."

In this case also, the Court founded its decision on S. 91 of the Indian Evidence Act and did not purport to lay down that where there is a cause of action complete in itself before the giving of the promissory note and independently of it, the plaintiff would not be able to prove it.

The question then is, whether this is a case where substantively the petitioner has an independent cause of action apart from the note. If he has, the admission of the loan in the written statement is under S. 58 of the Indian Evidence Act sufficient to waive the requirements of further proof and to enable the petitioner to succeed thereon. But if there is no such cause of action, the mere admission of the fact

1. (1913) I. L. R. 38 Mad. 660: 26 M. L. J. 19.
2. (1886) I. L. R. 10 Mad. 94.

by the defendant could not give him a cause of action and that is not a matter cured by S. 58 or any other section of the Indian Evidence Act. On this point, two decisions of the Calcutta High Court have been cited, one in *Sheikh Akbar* v. *Sheikh Khan*[1], and the other in *Pramatha Nath Sandal* v. *Dwarka Nath Dey*[2]. In the earlier case, Garth, C. J., described the two classes of cases, the first in which the plaintiff has a cause of action independently of the inadmissible instrument and the second where there is no such cause of action. In the case before him he held that there was no such independent cause of action. In *Pramatha Nath Sandal* v. *Dwarka Nath Dey*[2] Sir Comer Petheram, C. J., and another learned Judge had a case very like the present. The plaintiff had lent Rs. 200 to the defendant and taken a *hatchitta* which was held to be a promissory note which should have been stamped with a two-anna stamp but only bore one anna receipt stamp. The Judge of the Small Cause Court came to the conclusion that the plaintiff had no cause of action independently of the document and the document itself being inadmissible dismissed the suit. It was held that this dismissal was wrong. The learned Chief Justice said:

> "The defendant by his written statement admitted that he borrowed Rs. 200 from the plaintiff, and there can be no doubt that an implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it."

Referring to *Sheikh Akbar* v. *Sheikh Khan*[1], which was cited for the defendant and after setting out a passage from page 260 thereof, the learned Chief Justice proceeded:

> "These words, taken alone, may seem to indicate that when a bill or note is taken for a debt the action must be brought upon the bill or note; and that if for any reason the document is excluded, the action must fail; but a reference to the earlier portion of the judgment shows that such was not the meaning of the Chief Justice, and that when he spoke of a deposit he did not mean a loan, as he then says where money is *lent* and a bill or note given for the loan which is not paid at maturity, the creditor may disregard the note and sue on the original consideration."

I very respectfully adopt these words and think that there is nothing to show that that case is not applicable to the present or similar cases.

This view is as far as I know not against any decision of this Court to which my attention has been drawn and it is in keeping with the English decisions upon the point and is certainly in consonance with the requirements of substantial justice. For though the defendant contested the suit on the

1. (1881) I. L. R. 7 Cal. 256. 2. (1896) I. L. R. 23 Cal. 851.

Achuta-ramanna *v.* Jaganna-dham.

ground that the note was inadmissible in evidence, he not only admitted the loan in his pleading but had a month before the suit provided for its payment by executing a mortgage and leaving money with the mortgagee to pay the plaintiff. Holding therefore that the loan sued for was admitted by the defendant in his pleadings and that therefore no further proof was required, the plaintiff-petitioner was entitled to a decree. The decree of the learned District Judge is set aside and that of the District Munsif restored. The petitioner will have his costs here and in the District Court.

K. C. —— *Decree set aside.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

PRESENT:—LORD BLANESBURGH, LORD MACMILLAN AND SIR GEORGE LOWNDES.

Moulvi Zahir-ul-Said Alvi .. *Appellant**

v.

R. S. Seth Lachhmi Narayan .. *Respondent.*

P. C.

Zahir-ul-Said Alvi *v.* Lachhmi Narayan.

Consent decree—Appeal to Privy Council—Competency of.

No appeal lies to the Privy Council from a decree professedly made with the consent of the parties, and which did not, except so far as authorized by consent, embody any judicial finding by the Court itself. It can, if at all, be set aside only in substantive proceedings appropriate to that particular remedy.

Appeal No. 67 of 1929 from a decree of the Court of the Judicial Commissioner, Central Provinces, dated the 21st October, 1926.

The only question for determination on the present hearing was, whether the appeal to the Board was competent, in view of the circumstance that the decree appealed from was in fact made by consent of the parties.

(See, *inter alia,* 60 M. L. J. 648, where the previous proceeding before the Board is reported.)

Abdul Majid for appellant.

J. M. Parikh for respondent.

15th July, 1932. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—In this case the only question their Lordships have now to determine is whether the decree appealed

*P. C. Appeal No. 67 of 1929. 15th July, 1932.

P. C.

Zahir-ul-Said Alvi v. Lachhmi Narayan.

Lord Blanesburgh.

from, of the 21st October, 1926, which in terms is not expressed to be by consent, was in fact made by consent. In obedience to an order of His Majesty in Council of the 12th February, 1931, made in accordance with advice humbly tendered by their Lordships to His Majesty, a remit was sent to the Court of the Judicial Commissioner of the Central Provinces, being the Court which pronounced the decree in question, requesting that Court to inform their Lordships whether or not the decree was in fact made by consent.

Their Lordships have now been informed by the Court of the Judicial Commissioner in a report made to the Board, that its judgment of the 21st October, 1926, and the decree appealed from following thereon, were professedly made with the consent of the parties: that is to say, the decree was consensual and did not, except so far as authorised by consent, embody any judicial finding by the Court itself. Accordingly the decree is one from which no appeal to His Majesty in Council can be entertained. Only in substantive proceedings appropriate to that particular remedy can it, if at all, be set aside. As the Court of the Judicial Commissioner has declared that it proceeded entirely upon the consent of parties in making the decree appealed from, their Lordships have not thought it necessary to consider the other statements in its report as to the sufficiency or otherwise of that consent. Upon that declaration alone, they must deal with the appeal on the footing that it is entirely incompetent, and they must humbly advise His Majesty that it be dismissed, and with costs.

Solicitors for appellant: *Francis and Harker.*

Solicitors for respondent: *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Dwarampudi Basivireddi (minor) by mother and guardian Manikyam .. *Appellant** (*3rd respondent—3rd Judgment-debtor*)

v.

Gadi Kamaraju and others .. *Respondents* (*Petitioner-Decree-holder and Respondents Judgment-debtors 1 and 2*).

Basivireddi *v.* Kamaraju.

Mortgage—Moveables—Remedy of mortgagee—Decree for sale—Enforcement—Separate suit for personal decree if necessary—Subsequent mortgagee of moveable and immoveable properties—Remedy subject to prior mortgagee's lien.

A mortgage of moveable property is valid and a decree for sale can be passed in enforcement of that mortgage. Where the decree directs the sale of the mortgaged property the decree-holder can proceed to sell in execution and need not wait till after he files a fresh suit and obtains a personal decree against the mortgagor.

Mahamaya Debi v. *Haridas Haldar*, (1914) I. L. R. 42 Cal. 455, referred to.

Where a mortgagee of moveable property obtained a decree for sale and subsequently in a suit to which he was a party another mortgagee of the moveable and immoveable properties obtained a decree,

Held, that assuming the mortgagee of the moveables had only a lien on the property, the subsequent mortgagee decree-holder's right was subject to such lien.

Appeal against the order, dated 10th March, 1927, of the Court of the Subordinate Judge of Narasapur in Appeal No. 127 of 1926 preferred against the order, dated 10th April, 1926, of the Court of the District Munsif of Narasapur in E.P. No. 60 of 1926 in O. S. No. 296 of 1924.

G. Lakshmanna for appellant.

Ch. Raghava Rao and *A. Sundaram Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—The point for determination in this Civil Miscellaneous Second Appeal is whether the decree-holder in O. S. No. 296 of 1924 is entitled to take the amount in deposit in preference to the decree-holder in O. S. No. 410 of 1918.

The decree-holder in O. S. No. 410 is the appellant before this Court. In O. S. No. 296 the 1st respondent obtained a mortgage decree. The subject-matter of the mortgage was immoveable property and the crops that may grow on it. The

*C. M. S. A. No. 218 of 1927. 7th September, 1932.

decree stated generally that the decree-holder may realise his decree by sale of the mortgage property. To that decree the present appellant was a party as he also held a mortgage over the same property. He was the 3rd defendant in the suit. Before the execution of the mortgage decree the present appellant obtained a money decree and brought the standing crops on the property to sale. The mortgagee decree-holder then put in an application stating that the amount brought into Court should be utilised towards the discharge of his decree. His prayer was that the deposit amount may be transferred to his mortgage suit and that meanwhile the said amount may be attached and prevented from being paid to others.

It is undoubted law that a mortgage of moveable property is valid, and a decree can be passed in enforcement of that mortgage. The learned District Munsif held that inasmuch as the mortgage was of moveable property the decree-holder's right was not to take steps to sell it, but to enforce the lien which alone he has on the moveable property by obtaining a decree for money in a subsequent suit and as the procedure which the decree-holder has resorted to was unwarranted in law, he dismissed his application. In appeal the learned Subordinate Judge set aside the order of the District Munsif and ordered execution to proceed.

In this second appeal Mr. Lakshmanna has again emphasised the point on which the decision of the District Munsif is based, *i. e.*, his contention is that without obtaining a separate personal decree no execution can be proceeded with against the moveable property. What he states is that a separate suit should be instituted and it is only after obtaining a decree for money that any execution can be taken. In my opinion this contention cannot be accepted. Once a decree for sale of the property has been passed, the distinction that part of the mortgage property is moveable and part is immoveable is altogether effaced. There is a decree for sale of the mortgage property including the moveable as well as the immoveable property and as the decree gives the decree-holder the right to sell, I think without resorting to a separate suit the mortgage property can be brought to sale. Otherwise the position will lead to this complication. Having once obtained a decree for the sale of the property moveable though it may be he cannot execute that decree

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unless he obtains another decree in respect of the same property. A suit for the same relief in those circumstances cannot lie.

There is no direct authority on this point in any decision of the High Court but a decision in *Mahamaya Debi* v. *Haridas Haldar*[1] lends support to the conclusion arrived at by the Appellate Court. There, there was a mortgage of intangible property and a decree for foreclosure was passed. The learned Judges held that such a decree could be passed and executed. Relying on that decision the learned commentator, Sir D. F. Mulla, in his Civil Procedure Code, says: "A mortgagee of chattels is entitled to foreclosure quite as much as a mortgagee of immoveable property."[2] If a mortgagee of chattels is entitled to foreclosure quite as much as a mortgagee of immoveable property, I do not see any reason why a mortgagee of moveable property is not entitled to right of sale quite as much as a mortgagee of immoveable property.

In this case there is a further difficulty. The present appellant was a party to the decree in the mortgage suit. Even assuming as is argued on his behalf that there was only a lien declared by the decree as regards the moveable property, still being a party to the decree, his rights can only be subject to this lien and he cannot be heard now to say that his rights should be recognised first; and that the rights of the decree-holder in the mortgage suit should be recognised only later.

In these circumstances I think the order of the Lower Court is right and this Civil Miscellaneous Second Appeal is dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE REILLY.

Kallam Narayana .. *Appellant* (1st Accused).*

Kallam Narayana, *In re.*

Criminal Trial—Discovery of stolen goods—Relevancy in case of murder—Person in possession failing to explain—Inference—Presumptions of fact—Mode of drawing—Statements made by witness to Police during investigation—Admissibility—Criminal Procedure Code (V of 1898), Ss. 162 and 342—Evidence Act (I of 1872), Ss. 114 and 145.

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*Cr. Appeal No. 98 of 1932. 25th April, 1932.

1. (1914) I. L. R. 42 Cal. 455.
2. Mulla's Civil Procedure Code, 9th Ed., p. 911.

The possession of stolen things and the failure to explain that possession may be relevant and important facts in cases other than those of simple theft. When things, which were on a murdered person's body at the time when he was murdered, are traced to a person accused of the murder and he admits having concealed those things and fails to give any explanation for their possession, those may be important facts for use in making an inference that the accused took part in the murder.

Observations in *Sogaimuthu Padayachi* v. *King-Emperor*, (1925) I. L. R. 50 Mad. 274, not followed.

Rex v. *Schama and Abramovitch*, (1915) 84 L. J. K B. 396 and *Emperor* v. *Sheikh Neamatulla*, (1913) 17 C. W. N. 1077, referred to.

In making presumptions of fact or in drawing inferences of fact from evidence a Judge or a Jury must always have regard to the known facts of the case. They should not isolate a particular fact or group of facts from surrounding circumstances and discuss the logical inference therefrom.

Statements made by a witness to the Police in the course of the investigation of a case can never be used to corroborate the witness's evidence; and if the written record of what a prosecution witness has said to the Police is to be used to contradict him under S. 162, Criminal Procedure Code, it must be proved and used in accordance with the provisions of S. 145 of the Evidence Act.

Appeal against the order of the Additional Sessions Judge of the Court of Session of the Guntur Division in Case No. 58 of the Calendar for 1931.

S. Vepa for appellant.

Parakat Govinda Menon for *The Public Prosecutor* (*L. H. Bewes*) on behalf of the Crown.

The Court delivered the following

JUDGMENTS. *Reilly, J.*—Accused 1 in this case, the Appellant before us, a boy of 16, has been convicted of murdering Ambama, a girl of 12—14, at Amaravathi, on 30th September, 1931. Accused 2 in the case, who was charged with the same offence, was acquitted. Reilly, J.

There is undisputed evidence that Ambama, who lived at Amaravathi with her mother, P. W. 1, was at her mother's house soon after dark on the evening of 30th September: she then went to the adjoining house, where P. W. 3 lives: about evening-mealtime she was missing: her mother and relations searched for her all night but did not find her: early the next morning her dead body was found in a ruined and deserted fort at Amaravathi: death had been due to strangulation, part of her sari having been tied tightly round her neck with four knots: there were three incised wounds, described by P. W. 10, the Sub-Assistant Surgeon, who examined the body, as "muscle-deep," one above the navel, one on the left side of her abdomen

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and one on the back of her left wrist: there were also indications that she had been raped: a pair of silver anklets, two pairs of gold-plated copper bangles and a gold bead necklace, worth in all Rs. 45--50, which Ambama had been wearing on the previous evening and was in the habit of wearing, were missing from the body. P. Ws. 2 and 4 have given some evidence against the Appellant, which the learned Sessions Judge regards as quite untrustworthy and which it is not suggested for the Public Prosecutor we should treat as of any value. P. W. 5, a lamp-lighter, has given evidence that, while he was lighting lamps on the evening of 30th September, he saw Ambama going alone through the bazaar towards a temple, by which he appears to mean the temple close to the ruined fort, where her body was found next day. P. W. 3 says that about sunset on the evening of 30th September Ambama came to her house to play, as she used to do, and that, while they and others were playing, Ambama went away saying that the Appellant was calling her.

The evidence against the Appellant is that on the morning of 4th October, after he had been arrested, he said in the presence of the Inspector of Police, P. W 7, the Sub-Inspector, P. W. 15, the Village Magistrate, P. W. 8 and P. W. 9, an Assistant Karnam, that he and Accused 2 had hidden Ambama's ornaments in the fort and that he would show them: what he said was recorded in Ex. B, which was signed by P. Ws. 8 and 9 and others: then they all went to the fort, and at a spot about 25 feet from the place where the body had been found the Appellant removed some tiles and took out the earth, in which they had been buried, a pair of silver anklets and two pairs of gold-plated bangles, which have been identified as those Ambama had been wearing. The recovery of these things is recorded in a later part of Ex. B, which is again signed by P.Ws. 8, 9 and others and at this place also by the Sub-Inspector. The evidence of what the Appellant said and did on that occasion has not been recorded in the witnesses' depositions in the Sessions Court as fully and explicitly as it should have been. But what I have mentioned is the effect of their depositions and of Ex. B. That the Appellant said and did what I have mentioned is not now disputed; nor is it disputed that the anklets and bangles then produced by him, M. Os. 1 and 2, are the anklets and bangles which Ambama was wearing on the evening of 30th September. And of neither his production of the ornaments

nor his statement that he and Accused 2 hid them has the Appellant ever offered any explanation. At the trial he merely denied them.

It has been contended for the Appellant that evidence of his statement that he and Accused 2 hid the ornaments in the fort is not admissible. But that part of his statement distinctly relates to the discovery of the ornaments and is admissible under S. 27 of the Evidence Act—cf. *Queen-Empress* v. *Nana*[1] and the opinions of all the Judges in *Sogaimuthu Padayachi* v. *King-Emperor*[2]. What is much more seriously contended is that the production of the ornaments by the Appellant and his statement that he and Accused 2 had hidden them provide no ground for inference that he murdered, or took part in the murder of, Ambama. It is suggested that from the Appellant's possession and hiding of the ornaments no more serious inference should be drawn than that he stole the ornaments. Mr. Vepa for the Appellant has relied on the opinion of Wallace, J., in *Sogaimuthu Padayachi* v. *King-Emperor*[2], with whom, when the difference between Wallace, J., and Devadoss, J., was referred to him, Spencer, J., agreed. In that case there was evidence that the Pandarasannadhi of a mutt had been murdered and that some jewels, currency notes, etc., belonging to the murdered man or to his mutt were produced by the accused after making statements admissible under S. 27 of the Evidence Act that they had buried them. The accused offered no explanation how they came to be in possession of the things; but Wallace, J, refused to draw an inference that they had taken part in the murder. I gather from the report that the things recovered were buried by the accused at a considerable distance from the mutt, where the murder was committed. It appears that none of the things was on the person of the murdered man at the time he was killed, that there was no evidence that they were in the mutt at the time of the murder, that there was no evidence that they were missing when the murder was discovered and that there was evidence that, after the murder was discovered and before the loss of these things was discovered, the jewel-room of the mutt, in which they had been kept, was raided by the people of the crowd who came to

1. (1889) I. L. R. 14 Bom. 260 (F. B.).
2. (1925) I. L. R. 50 Mad. 274.

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the mutt after the murder was discovered. With respect it appears to me clear that Wallace, J., was right in that case in refusing to draw from the production of the jewels and notes by the accused and their admissions that they had buried them an inference that they had taken part in the murder of the Pandarasannadhi.

Mr. Vepa however relies, not on the actual decision in that case, but on passages in the judgments of Wallace, J., and Spencer, J. In Wallace, J.'s judgment he says:

"In such a case I am confident that neither law nor justice justifies the hanging of a man simply because he does not plead guilty to being a thief or a receiver of stolen property. The Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder has been committed, but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it."

Spencer, J, expressed agreement with the first of those sentences and also said:

"When the charge is that the accused committed murder or theft in a building or both, is it legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property? I think the answer must be that if there is other evidence to connect the accused with the death of the murdered man, a jury or in this country a Judge, may find upon circumstantial evidence that he is the murderer. But when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered."

With great respect these general statements do not appear to me to have been necessary for the disposal of the case in which they were made. But it must be remembered that the first sentence quoted from Wallace, J.'s judgment begins with the words "In such a case," meaning such as the one with which he was dealing; and I do not think it was fair to the learned Judge to quote the rest of the sentence, as Spencer, J., did, omitting those very important qualifying words. But with the greatest respect I do not understand why the sentence even with those qualifying words appears in the judgment. I do not understand why any reference to the nature of the punishment which may follow should be brought into a discussion of the inference of fact to be drawn from certain evidence. And, as for convicting a man of murder in such a case or in any case "simply because he does not plead guilty to being a thief or a receiver of stolen property," no one can seriously suppose that

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any such question ever arose. And the statement that, "the Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder has been committed but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it," whether intended to apply generally or only to the case with which the learned Judge was then dealing, was I venture to think a serious overstatement. When it is the duty of a Judge or a Jury to draw from evidence a reasonable inference, it is not their duty to find that there was no conceivable possibility other than the conclusion which they reach. It is not possible for reasonable men to conduct the affairs of life or to make judicial decisions on questions of fact with mathematical certainty. And again with the greatest respect Spencer, J.'s remark as to what can be done "when the unexplained possession of stolen property is the only circumstance appearing against an accused charged with murder and theft" does not appear to me to be helpful apart from the fact that it is inconsistent with the latter part of the same sentence. We are here dealing with inferences of fact and presumptions of fact within the principle of S. 114 of the Evidence Act. It is often instructive to observe what inference other Judges have thought proper to draw from certain evidence or what assumptions or presumptions of fact they have thought fit to make in certain circumstances. But outside the sphere of presumptions of law it appears to me a waste of words and effort for any Judge or any Court to attempt to lay down by general ruling, or even to express general opinions, what inference may or may not be drawn by other Judges from other facts in other cases. That is a matter which Anantakrishna Aiyar, J., and I had to discuss recently in *Sri Raja Bommadevara Chayadevamma* v. *Venkataswamy*[1]. There is one general rule which must never be forgotten, namely, that in making presumptions of fact or in drawing inferences of fact from evidence a Judge or a Jury must always have regard to all the known facts of the case. And that they must do so because they are required to decide on all questions of fact as reasonable men. To attempt to isolate a particular fact or group of facts from surrounding circumstances and to discuss the logical inference may be useful

1. (1931) 62 M. L. J. 511.

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mental exercise; but it appears to me wholly out of place in a judicial decision.

What are the facts proved in this case? The girl Ambama was murdered in the ruined and deserted fort at some time between lamp-lighting time on the evening of 30th September and the early morning of 1st October: she was also raped: ornaments of considerable value, which she habitually wore and which she was wearing on the evening of 30th September, were missing from her body when it was discovered the next morning, though there were then on the body some trinkets of small value: the Appellant, as he admitted on 4th October, with Accused 2 buried all the missing ornaments but one at a spot in the fort only a few yards from the place where the girl was murdered, and from that spot he produced those ornaments: he made that admission when he was under arrest for the murder of the girl to the officers who were investigating the murder: neither then nor at any other time has he given any explanation admissible in evidence of his connection with the ornaments. Of the surrounding circumstances we may infer from the evidence that Ambama might go about the town by herself without exciting surprise, that her mother, when she was missing, thought it possible that she had gone off to watch a theatrical performance, and that she went away from P. W. 3's house on the evening of 30th September in the middle of a game, saying that Accused 1 was calling her, which did not excite any protest from P. W. 3. What is the reasonable inference to be drawn from the proved facts? It has been suggested that before it can properly be inferred from these facts that the Appellant took part in the murder of Ambama all other possible explanations of his part in burying the ornaments must be shown to be untrue or very improbable and that the fact that he was at one time in possession of these ornaments shows at the utmost that he took part in stealing them: possession of stolen property it is urged may be evidence of theft but not of a more serious offence. These arguments I think involve confusion of thought. The evidence that an accused person was in possession of stolen property soon after it was stolen is most commonly of use in theft cases. But the possession by itself is never sufficient evidence that the possessor was the thief. In such cases it is the possession of the stolen property soon after the theft combined with the

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failure of the possessor to give any reasonable explanation of his possession which enables the Judge or Jury to draw an inference that he was the thief, if after considering all the circumstances, so far as they are known, they think that inference reasonable. There may be many conceiveble explanations why the accused person was in possession of stolen property. He might have been induced by the real thief innocently to take care of the stolen things; he might have been compelled to do so under a threat of violence; he might have seen the real thief drop them or he might have found them lying on the ground, and in either case he might have intended to misappropriate them or merely to keep them until he ascertained who was their owner; he might have himself stolen them from the original thief or have robbed or murdered the original thief in order to get possession of them. There may be a hundred possible explanations other than that he himself was the original thief. But it is not for the Judge or Jury to invent or imagine such explanations. It is for the accused person to give his explanation, if he has one. If he gives no explanation, then it is for the Judge or Jury as reasonable men to draw an inference from the proved facts after considering all the circumstances. And on the way to that inference they may raise such presumptions of fact as appear to them reasonable presumptions which arise from their experience of the world and of life, the course of human conduct and human nature. Such presumptions they will often reach by unconscious reasoning, and they will be based not on facts proved by evidence in the case but on facts of general knowledge In essence such presumptions also are inferences of fact. It is not the law that the Judge or Jury must be certain that no other explanation of the facts is possible before they find the accused person guilty. But, if their inference is that he is guilty, it must be a reasonable inference reached with due regard to all the circumstances and with such care and assurance as a reasonable man would think necessary before he drew an important inference in his own most serious affairs, and all the facts proved must be clearly in their minds, including the very important fact that the accused person has offered no explanation of his possession of the stolen things. The Judge or Jury must be satisfied that there is no reasonable doubt that the accused person was the thief, and in that sense they must be satisfied that the only

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explanation of the facts reasonably to be accepted is that he was the thief. It is not required that they should be satisfied that no other conceivable explanation is consistent with the facts. If the accused person offers a reasonable explanation, then, as pointed out by the Court of Criminal Appeal in *Rex* v. *Schama and Abramovitch*[1], it is for the prosecution to show that that explanation is untrue. But, if the accused offers no explanation, it is not for the Judge or Jury to invent one. One of the facts before them, which it is their duty to take into account, is the fact that he has offered no explanation.

The possession of stolen things and the failure to explain that possession may be relevant and important facts in cases other than those of simple theft. When the theft has been committed in the course of, or in connection with, house-breaking, they may often be important facts for use in making an inference that the accused person took part in the house-breaking. And, when things, which were on a murdered person's body at the time when he was murdered, are traced to a person accused of the murder and he gives no explanation of his possession of them, those may be important facts for use in making an inference that he took part in the murder—cf. *Queen-Empress* v. *Sami*[2], *The Public Prosecutor* v. *Chirreddi Munayya*[3] and *The Emperor* v. *Sheikh Neamatulla*[4]. In the present case it is possible to suggest many conceivable explanations how the Appellant came to join with Accused 2 in burying Ambama's ornaments. It is not inconceivable that they took the ornaments from her while she was alive and that some one else afterwards murdered her. It is not inconceivable that they found her lying dead and then removed her ornaments. It is not inconceivable that Accused 2 murdered her and afterwards forced the Appellant to assist him in burying the ornaments. It is possible to imagine many other explanations of what the Appellant has admitted that he did. But it is not for us to invent those explanations. During all the time which has elapsed since the Appellant made his admission on 4th October he has never offered any such explanation. We have no right, and the learned Sessions Judge had no right, to indulge in speculation. We must return to the question what in the circumstances is the reasonable

1. (1915) 84 L. J. K. B. 396.
2. (1890) I. L. R. 13 Mad. 426.
3. (1911) 21 M. L. J. 1071.
4. (1913) 17 C. W. N. 1077.

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property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. Wallace, J., qualifies his statement by the use of the words " in such a case "; but Spencer, J.'s observations have no such important qualification. In my view, it is not correct to say that the Court is not entitled to draw the inference that the accused committed a murder or was present when it was committed when the accused is found in possession of the property proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place or places where such property is concealed and admits having concealed such property and fails to give any explanation for the possession of those goods or their disposal or such an explanation as can reasonably be accepted. S. 114 of the Indian Evidence Act allows the Court to draw inferences of fact and presumptions of fact. That section provides:

> " The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

This section, therefore, entitles the Court to draw any reasonable inference or presumption of fact. It is a matter of common procedure to utilise evidence of this kind and the presumption such as this in connection not only with theft and the receipt of stolen goods but with more aggravated offences. I propose to refer to two cases only. One of which deals very clearly with the presumption in the case of the offence of receiving stolen property and the other with the presumption in a case of murder. The former is an English case, *viz.*, *Rex* v. *Schama and Abramovitch*[1]. The appellants there were charged with the offence of receiving stolen goods well knowing the same to have been stolen. The evidence for the prosecution established that the appellants were in possession of goods recently stolen and the Judge in directing the jury said:

> " It is the duty of the prosecution to prove the case against the prisoners. The burden of proof is on them up to a point, that is to say, they have to prove that the goods were stolen, and the stolen goods were in the hands of

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1. (1915) 84 L. J. K. B. 396.

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these people; but then the prisoners have to give an account of how the goods came into their possession"

and

"As I said from the beginning the prosecution have to prove that these men were dealing with stolen goods. That they have done. The prisoners are then put to explain how it came that they were dealing with these stolen goods, and to give an explanation which will satisfy twelve reasonable men."

It was held by the Court of Criminal Appeal that this was misdirection and that the true position was that, in the absence of any explanation by the accused of the way in which the goods came into his possession, which might reasonably be true, the jury might convict the prisoner but that, if an explanation were given which the jury thought might reasonably be true, although they were not convinced of its truth, the prisoner was entitled to be acquitted inasmuch as the Crown would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. The other case is *The Emperor* v. *Sheikh Neamatulla*[1]. There it was held by Jenkins, C. J., and Sharfuddin, J., that, where in a case of murder blood-stained ornaments were found in the room occupied by the accused and the evidence established that those articles belonged to the deceased, and in the Sessions Judge's charge to the jury there was no direction pointing out that the possession in the case, if believed, was a fact from which the Court might presume not merely theft or receipt of stolen property but also murder with which the accused was charged, that was a serious omission detracting materially from the value of the verdict and opinion of the jurors. Jenkins, C. J., points out in the course of his judgment that it is clear that the inferences and presumptions in criminal cases which are provided for in S. 114 of the Indian Evidence Act arise not only in connection with cases of theft and receipt of stolen goods but also in connection with other offences. I have thought it necessary to make these observations which are entirely in agreement with those which have fallen from my learned brother, because *Sogaimuthu Padayachi* v. *King-Emperor*[2] is constantly quoted in this High Court as an authority for the principle that Criminal Courts in the absence of any explanation by the accused can only draw an inference that the accused committed the murder where no other inference is possible. It was not

1. (1913) 17 C. W. N. 1077. 2. (1925) I. L. R. 50 M. 274.

necessary in *Sogainuthu Padayachi* v. *King-Emperor*[1] to lay down any such general principle and for that reason it cannot be accepted as a decision upon this point; and, for the reasons I have already given, I do not agree with the opinions of the learned Judges on this question in that case.

B. V. V. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Currimbhoy and Company, Limited .. *Appellants**

v.

L. A. Creet and others .. *Respondents.*

Contract by correspondence—Stipulation for execution of a formal agreement—Whether a condition or term of the bargain—Contract when concluded—Counter-claim, not competent in Mofussil Courts—Claim for specific performance of contract, if time-barred, cannot be urged in defence—Evidence Act, S. 116—Licensee—Estoppel of.

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract was intended as a condition or term of the bargain, or whether it was a mere expression of the desire of the parties for a formal agreement. In the former case, there is no concluded or enforceable contract until the condition is fulfilled, *i. e.*, until the formal agreement has been executed. In the latter case, there is a binding contract and the reference to the more formal document may be ignored.

Von Hatzfeldt-Wildenburg v. *Alexander*, (1912) 1 Ch. 284 at 288, per Parker, J., followed.

Harichand Mancharam v. *Govind Luxman Gokhale*, (1922) L. R. 50 I. A. 25: I. L. R. 47 Bom. 335: 44 M. L. J. 608 (P. C.), referred to.

In the Mofussil Court a counter-claim is incompetent, and the defendant must enforce any such claim by a separate suit.

In answer to an action of ejectment, the defendant cannot plead and set up a claim to specific performance of a contract, when his right to enforce such contract by suit has become barred by limitation under the Limitation Act, Art. 113. *Ariff* v. *Jadunath Majumdar*, (1931) L. R. 58 I. A. 91: I. L. R. 58 Cal. 1235: 60 M. L. J. 538 (P. C.), referred to.

Where defendant No. 1 came into possession of certain coal mining lands as a licensee of the plaintiff, and subsequently the defendant No. 2, as assignee of and claiming through the defendant No. 1, entered into possession, *held*, that the possession of the lands by both the defendants must be attributed to the possession given to the defendant No. 1 by the plaintiff, and they were both barred by S. 116 of the Evidence Act from questioning the

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*P. C. Appeal No. 21 of 1931. 22nd November, 1932.
Bengal Appeals Nos. 29 and 33 of 1929.

1. (1925) I. L. R. 50 Mad. 274.

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plaintiff's title to those lands until they had surrendered possession thereof again to him.

Judgment of the High Court, Calcutta (I. L. R. 57 Cal. 170), varied.

Consolidated appeals No. 21 of 1931 from a decree of the High Court, Calcutta, dated the 23rd August, 1929, varying a decree of the Court of the Additional Subordinate Judge of Asansol, dated the 12th October, 1928.

On the 14th May, 1924, the plaintiff L. A. Creet instituted the present suit against Oosman Jamall & Sons, Ltd., for recovery of *khas* possession of certain lands; for an account of the coal extracted and raised by the defendants, and for damages for breach of contract. In the alternative there was a prayer, in case the Court came to the conclusion that there was a contract which the defendants had a right to have specifically enforced, for a decree for specific performance.

In June, 1926, an order was passed for compulsory liquidation of the defendant company (Oosman Jamall & Sons, Ltd.), and on the 28th July, 1927, Currimbhoy & Co., Ltd. were upon their own application added as defendants.

The Trial Court decreed the plaintiff's suit against all the defendants. The plaintiff was declared entitled to recover *khas* possession of the lands in possession of the defendants, and the value of the coal extracted was assessed at Rs. 5,69,445, and the plaintiff was declared entitled to recover the said sum together with Rs. 10,000 as damages for breach of contract.

From the decree of the Trial Judge the defendants Currimbhoys alone appealed to the High Court in Calcutta. By a judgment and decree, dated the 23rd August, 1929, the High Court modified the decree of the learned Subordinate Judge. They held that the plaintiff L. A. Creet was not entitled to possession of so much of the lands which Currimbhoys obtained from one J. C. Sarkar and his brothers, and that he (the plaintiff) was entitled to get damages from Currimbhoys for extraction of coal from the 28th July, 1924 to the 25th November, 1924. The total value of the coal extracted after deducting certain sums was found to be Rs. 51,563. Against the said decree of the High Court, both the plaintiff L. A. Creet and the defendants Currimbhoys appealed to His Majesty in Council.

Upjohn, K. C., De Gruyther, K. C. and *J. M. Parikh* for defendants Currimbhoys.

Dunne, K. C., G. T. Simonds, K. C., S. Hyam and *L. P. E. Pugh* for plaintiff Creet.

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22nd November, 1932. Their Lordships' judgment was delivered by

LORD THANKERTON.—These are two consolidated appeals from a decree of the High Court of Judicature at Fort William in Bengal, dated the 23rd August, 1929, varying a decree of the Additional Subordinate Judge of Asansol, dated the 12th October, 1928.

On the 14th May, 1924, the present suit was instituted by L. A. Creet against Oosman Jamall & Sons, Limited, for *khas* possession of certain coal mining lands in Mouza Khandra, for an account of the coal extracted therefrom by Jamalls, and for damages for breach of contract. In the alternative a somewhat unusual decree for specific performance was asked for.

In June, 1926, Jamalls went into compulsory liquidation, and on the 17th July, 1926, the liquidator was added as defendant No. 2; on the 2nd October, 1926, the liquidator filed a written statement adopting the written statement filed by Jamalls.

On the 28th July, 1927, Currimbhoy & Company, Limited, were added as defendant No. 3, as a party claiming to be interested in the lands in suit under an agreement with Jamalls, dated the 13th September, 1922, and filed a written statement on the 12th August, 1927. On the 25th January, 1928, the liquidator of Jamalls assigned to Currimbhoys the whole rights and interests of Jamalls in their alleged contract with Creet, in the subject-matter of the present suit and in the plant and equipment of their colliery on the lands in suit, as well as in the moneys deposited by them under orders of the Court.

Early in 1920 Creet had obtained mine-prospecting leases in respect of certain of the lands in Mouza Khandra, and had started sinking a shaft. By letter, dated the 18th April, 1920, he proposed to Jamalls that they should take over the enterprise from him on certain terms; negotiations followed, mostly by correspondence, in course of which Creet agreed that Jamalls should take over the place immediately, and, in fact, they took possession from Creet of certain lands, which included the shaft, on the 1st June, 1920, and proceeded to develop and work the minerals. On the other hand, Creet, who at that time had only got prospecting leases, proceeded to obtain titles to the minerals, and became involved in certain litigations, which

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delayed his obtaining some of the conveyances of the mineral rights. Some of these suits were still pending when the present suit was commenced.

The main case for the plaintiff Creet was that a contract was concluded between him and Jamalls in May, 1920, under which the parties were contractually bound to execute a formal agreement embodying the terms of the contract, that Jamalls delayed their execution of the formal agreement, that, finally, in February, 1923, he gave them notice that, if they did not execute the agreement within fourteen days, he would hold the contract to be at an end, and that, in breach of the contract, they failed to do so. In May, 1924, he raised the present suit, claiming *khas* possession, damages for breach of contract, and an account of the coal extracted, on the footing that they were trespassers. Alternatively, he asked, "if the Court finds that the defendants have a right to have any contract specifically enforced," for a decree for such specific performance and a decree for all such sum or sums of money or moneys that might be payable by the defendants and for executing agreement and conveyance mentioned above or all such agreements and conveyances as to the Court should seem fit.

The main case for the defendants was that a contract was concluded between Creet and Jamalls in May, 1920, in terms similar to those alleged by the plaintiff, but with the exception of any obligation to execute a formal agreement, and that they were not in breach of the contract, and they asked for a decree for specific performance. Certain other grounds of defence will be noticed later.

On the 12th October, 1928, the Subordinate Judge gave decree in the plaintiff's favour against all three defendants. He accepted the plaintiff's version of the contract and held that Jamalls were in breach of the contract in February, 1923, and that the plaintiff duly rescinded it at that time. He further held that the defendants were trespassers after that date, and were accountable for the value of the coal extracted, less the cost of raising it to the bank, from the end of February, 1923, until 1928, which he assessed at Rs. 5,69,445. He awarded Rs. 10,000 as damages for breach of contract. As against these sums he allowed a deduction of Rs. 30,000, which Jamalls had advanced to the plaintiff towards the price payable under the contract and

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which he regarded as earnest money; but he disallowed the deduction of payments by Jamalls to Creet, amounting to Rs. 7,641-15-9 to reimburse the latter for outlays. The learned Judge rejected all the defendants' contentions and gave decree for *khas* possession and for Rs. 5,49,545 with costs.

Defendant No. 3, Currimbhoys, appealed against this decree to the High Court, which disposed of the appeal on the 23rd August, 1929, by setting aside the decree of the Subordinate Judge so far as it related to Currimbhoys, save as to costs, and in lieu thereof decreed (*a*) that Currimbhoys should make over possession of all lands, surface and underground, mentioned in the plaint save and except the lands covered by the conveyance from the Sarkars in their favour, dated the 25th November, 1924, with a declaration that the plaintiff Creet was entitled to recover damages to the extent of his share in the lands at Karabagan during the period from the 28th July, 1924, to the 25th November, 1924; and (*b*) that in respect of such damages Currimbhoys should pay to Creet a sum out of Rs. 51,563 in proportion to his (Creet's) share in the lands at Karabagan, with interest. They further remanded the case to the Lower Court to ascertain the sum so payable, and otherwise affirmed the decree of the Lower Court.

It will be necessary later to explain and deal with the defence grounded on the conveyance by the Sarkars, but the decision of the High Court was based on a view of the contractual relations between the parties, which was repudiated by both parties before this Board. After February, 1923, certain negotiations took place between the parties, which finally terminated early in 1924. These negotiations were expressly stated to be without prejudice, but the High Court took the view that they culminated in December, 1923, in a concluded and binding contract, which superseded any previous contract there might have been. They took a slightly more liberal view of the deductions to be allowed in calculating the value of the coal extracted, and they omitted the damages for breach of contract as against Currimbhoys.

While previously there may have been some doubt current as to the law in India, it is remarkable that, throughout the pleadings, the judgments and the cases of appeal before this Board—indeed, until Counsel's attention was called to it at the hearing before their Lordships—no reference was made to the

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decision of this Board, dated the 20th December, 1922, in *Harichand Mancharam* v. *Govind Luxman Gokhale*[1], which made clear that the principle of the English law which is summarised in the judgment of Parker, J., in *Von Hatzfeldt-Wildenburg* v. *Alexander*[2], applies in India. Parker, J., states:

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

In the present case, if the execution of a formal agreement, as the plaintiff maintained and the Subordinate Judge held, was intended to be a condition of the bargain of May, 1920, it followed that the latter never became an enforceable contract and the finding of breach of contract disappeared. If, on the other hand, as maintained by the defendants, it was a mere expression of the desire for a formal agreement, it could be ignored, and any case of breach of contract by refusal to sign it equally disappeared. It follows, as conceded before their Lordships by plaintiff's Counsel, that it is no longer possible to treat the defendants as trespassers, their possession having been originally granted by the plaintiff.

The claim that the defendants were in breach of contract and that they were trespassers after February, 1923, being thus out of the way, their Lordships are of opinion, in the view that they take of the case, that it is immaterial whether there was a concluded contract or not, but it is necessary, first of all, to dispose of certain contentions maintained before them on behalf of Currimbhoys.

It was maintained on behalf of Currimbhoys that, as assignees of Jamalls, they were entitled to a decree for specific performance of a contract concluded in May, 1920, as maintained by them, or, failing that, a contract to be implied from the possession then obtained by them and the subsequent actings of both parties, whether these amounted to a waiver of the

1. (1922) L. R. 50 I. A. 25 : I. L. R. 47 Bom. 335: 44 M. L. J. 608 (P. C.).
2. (1912) 1 Ch. 284 at 288.

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condition as to a formal agreement, leaving the remaining terms as a concluded contract, or necessarily implied the conclusion of a new agreement. While a perusal of the correspondence from May, 1920, to February, 1923, satisfies their Lordships that the demand for a formal agreement was repeatedly made and never departed from by the plaintiff, and that no new agreement can be implied from the *res gestae*, as the plaintiff's attitude precludes any such conclusion, any claim by the defendants for specific relief is now clearly barred by limitation and cannot be entertained. It was admitted by the defendants' Counsel that in the *mofussil* Court a counterclaim is incompetent, and any such claim must be enforced by a separate suit. No such suit has been raised, and any such claim has long ago suffered limitation under Art. 113 of Sch. I to the Limitation Act, which prescribes a period of three years from the date fixed for performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. The defendants' Counsel sought to found on a passage in the judgment of this Board in *Ariff* v. *Jadunath Majumdar*[1], the passage is as follows:—

"Their Lordships find themselves in agreement with the High Court in the view that *Walsh* v. *Lonsdale*[2] has no application to this case, owing to the fact that the respondent's right to enforce the verbal contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this action. Had he been so entitled, the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but consistently with and not in violation of the provisions of the Indian statute."

In the case suggested in the latter part of that passage, if the respondent had delayed until, at a date subsequent to the raising of the ejectment action, his right to institute the counter-action became barred by limitation, he would have been no better off than he was with the limitation bar in operation when the ejectment action was instituted.

There remains the contention of Currimbhoys based on the registered lease by the Sarkars in their favour, dated the 25th November, 1924, of their rights as co-sharers to the coal lying under 100 *bighas* of *bajeapti khas* and *khas khalasi* lands in

1. (1931) L.R. 58 I.A. 91 at 101: I.L.R. 58 Cal. 1235: 60 M.L.J. 538 (P.C.).
2. (1882) 21 Ch. D. 9.

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Mouza Khandra, and, in particular, under Karabagan, which is part of the lands of which recovery of possession is sought by the plaintiff in this case. They maintain that the plaintiff's claim to *khas* possession must be limited accordingly, and that any claim to the value of coal extracted after 25th November, 1925, must also be so limited. The Subordinate Judge held that possession of all lands in the *mouza* by the defendants must be attributed to the possession given to Jamalls by the plaintiff and that, in view of S. 116 of the Evidence Act, they could not question the title of the plaintiff till they had surrendered possession to him. The High Court sustained the contention of Currimbhoys and, as already stated, found that the plaintiff's claim for *khas* possession and his claim for the value of coal extracted must fail in so far as the property, surface and underground was covered by the lease of 25th November, 1924. It is difficult to follow their reason for excluding the operation of S. 116, especially as they found that Currimbhoys were in possession of the disputed colliery from September, 1922. Their Lordships agree with the finding of the Subordinate Judge that the possession of both Jamalls and Currimbhoys must be attributed to the possession given to Jamalls by the plaintiff in May, 1920, and they further agree with his conclusion that both defendants are barred by S. 116 from questioning the plaintiff's title until they have surrendered possession again to him. It was argued that S. 116 only excluded a challenge of the plaintiff's title as at the time when he gave possession to Jamalls, and that the plaintiff's title was only challenged as from and after the lease by the Sarkars, but the Sarkars only communicated to Currimbhoys the same title as they had held in May, 1920, for the plaintiff's action against the Sarkars proved, in its result, that he had no right to a title from them. Accordingly, any right of challenge open to Currimbhoys was equally open to the Sarkars in May, 1920, when Jamalls were given possession.

Their Lordships are therefore of opinion that the plaintiff Creet is entitled to *khas* possession of all the lands, surface and underground, in Mouza Khandra which are in the possession of the defendants, and that the defendants must account to the plaintiff for the value of the coal extracted by them during the period of their possession from the 1st June, 1920, onwards on the lines hereinafter indicated, subject to adjustment as regards

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certain payments which the plaintiff has received. For this purpose it will be equitable to revise the decree of the Subordinate Judge against defendants Nos. 1 and 2, as the claim for damages for breach of contract is not tenable, and all the defendants should be included in the same decree.

In the account to be taken, the plaintiff will be credited with the gross value of the coal, calculated, so far as available, on the prices actually realised by the defendants in open market and *quoad ultra* at current market prices, as nearly as these can be fixed by the Court. As against the gross value of the coal there will be charged all expenses properly incurred by the defendants in getting the coal, bringing it to bank and marketing it including any rents or royalties so incurred; if these are not ascertainable, the Court will fix a proper rate to be deducted from the gross value in respect of these matters. A deduction from the gross value will also be allowed, to be based on a reasonable rate of depreciation on any capital expenditure by the defendants in respect of development of the mines, structures above and below ground, boilers and machinery, properly incurred for colliery purposes. Any amount realised on their removal under decree of the Court is not necessarily relevant to the determination of a proper rate of depreciation. The nett amount thus arrived at will form the first item in the account.

The defendants will be credited with the following amounts, *viz.*: (1) the sum of Rs. 30,000 advanced by them to the plaintiff, which was allowed as a deduction by the Subordinate Judge, (2) the sum of Rs. 7,641-15-9 paid by the defendants to Creet, which was disallowed by the Subordinate Judge, and (3) the sum of Rs. 55,000 paid into Court by the defendants, and subsequently paid out to the plaintiff.

It will be necessary to recall the decrees, dated the 12th October, 1928 and the 23rd August, 1929, and to remand the case to the High Court to ascertain the balance due on an account taken on the above lines, the Court determining what interest, if any, should properly be allowed on any of the items, and to dispose of the case. Their Lordships will humbly advise His Majesty accordingly. No costs will be allowed in the Lower

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Courts up to the present stage or in the present appeals; any further costs will be dealt with by the Court in India.

Solicitors for Currimbhoys: *Watkins & Hunter.*

Solicitors for Creet: *Sanderson Lee & Co.*

K. J. R. *Decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BARDSWELL.

Karuppayya Nadar through his authorised agent Ratnasami Nadar .. *Petitioner* (Petitioner in C. R. P. No. 991 of 1932 on the file of the High Court)*

v.

Ponnuswami Nadar and another .. *Respondents (Respondents in do.).*

Karuppayya Nadar v. Ponnuswami Nadar.

Letters Patent, Ss. 19, 20 and 21—High Court's power to grant injunction over and above powers enjoyed under Civil Procedure Code—Equitable jurisdiction derived from Supreme Court—How far applicable to chartered High Courts on their appellate jurisdiction.

Where a decree was passed *ex parte* against the petitioner, defendant in the suit, and he then applied for setting aside of the decree and it was ordered by the Lower Court that on his furnishing security for the suit amount and costs within three weeks the decree should be set aside but the report of the Amin regarding the sufficiency of the security bond having not been received within the time and no application having been made by the petitioner to extend time, the Lower Court dismissed the application and against that order the petitioner filed a Civil Revision Petition in the High Court and applied subsequently in the present petition for an injunction restraining the respondents-plaintiffs from executing the decree pending disposal of his Revision Petition and invoked the extraordinary powers of the High Court to grant injunction which power it derived from the Supreme Court,

Held, that in the light of S. 21 of Letters Patent this was not a case in which the High Court could grant an injunction.

Govindarajulu Naydu v. *Imperial Bank of India, Vellore,* (1931) 35 L. W. 168, distinguished.

Petition praying that in the circumstances stated in the affidavit filed with C. M. P. No. 3428 of 1932 on the file of the High Court, the High Court will be pleased to issue an injunction restraining the respondents herein from executing the decree in O. S. No. 57 of 1931 on the file of the Court of the Subordinate Judge of Ramnad. at Madura pending Civil

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*C. M. P. No. 4876 of 1932. 19th October, 1932.

Karuppayya Nadar v. Ponnuswami Nadar.

Revision Petition No. 991 of 1932 presented to the High Court to revise the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 8th July, 1932, made in I. A. No. 170 of 1932 in the said O. S. No. 57 of 1931.

K. S. Champakesa Aiyangar for petitioner.

Wairap S. Subrahmania Aiyar for respondents.

The Court made the following

ORDER.—The petitioner is the defendant in O. S. No. 57 of 1931 on the file of the Principal Subordinate Judge of Ramnad at Madura. A decree was passed against the petitioner *ex parte*. He then applied for the setting aside of that decree and it was ordered that it should be set aside if he gave security for the suit amount and costs within three weeks. The order as to this was passed on 12th March, 1932, and a draft security bond was filed on 15th March, 1932. The report of the Amin as to the sufficiency of the security was not received within the three weeks' time allowed for furnishing security, and so an application (I. A. No. 170 of 1932) was made for extending the time but, after notice had been given to the other side, the learned Subordinate Judge held, on 8th July, 1932, that the security had not been furnished within the time allowed and that it was not competent for him to extend the time, and dismissed the application. In the meantime, according to the petitioner's affidavit, the Amin had reported that the security offered was sufficient. Against this order on I. A. No. 170 of 1932 the petitioner has come up on revision.

The petitioner at first filed C. M. P. No. 3428 of 1932 praying for stay of execution of the decree in O. S. No. 57 of 1931 pending the disposal of the revision petition. This petition I am dismissing because there was no appeal against, or even petition for revision of, the decree in that suit. Subsequently the present petition has been filed, praying for an injunction restraining the respondents-plaintiffs from executing the decree in the said suit pending disposal of the revision petition.

It is objected that no injunction can be granted in this case. It is not a case that falls under either R. 1 or R. 2 of O. 39, Civil Procedure Code and it has been held by this Court in *Varadacharyulu* v. *Narasimhacharyulu*[1] and *Ayyaperumal*

1. (1925) 23 L. W. 85.

Nadar v. *Muthuswami Pillai*[1] that the High Court has n power to grant an injunction under its inherent powers in case not governed by O. 39. These decisions I have myself recentl had occasion to follow in C. M. P. No. 3349 of 1932. That thi is a correct view of the law, as far as it is contained in the Civi Procedure Code, is not denied by the learned Advocate for th petitioner, but he contends that, apart from the Code, thi Court has extraordinary powers of granting injunctions, whicl powers it derives from the Supreme Court. He relies on th decision of Curgenven, J., in *Govindarajulu Nayudu* v. *Imperia Bank of India, Vellore*[2]. In that case the learned Judge, ir dealing with a prayer for an injunction to restrain from th execution of a decree during the pendency of an appeal agains an order of the Subordinate Judge of Vellore, held that th High Courts possess, over and above the powers which the enjoy under the Civil Procedure Code, an equitable jurisdiction derived from the old Supreme Court, to issue an injunction ir appropriate cases and are not bound by the terms of the Cod in issuing such injunction. For the respondents it is urge that the learned Judge has not considered the provisions of th Letters Patent to which, indeed, as far as can be seen from hi decision, his attention was not drawn. Emphasis is now lai on those provisions. It is only under S. 19 of the Letter Patent that a chartered High Court can administer the law and equity that would have been applied by such High Court i the Letters Patent had not been issued, and the cases in which i can apply such law or equity are cases arising in the exercise o its ordinary original civil jurisdiction. By S. 20, in the exercis of its extraordinary original civil jurisdiction, it can apply to a case the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein; while under S. 21, which governs the cas under notice, it has to apply to any case that comes before it ir the exercise of its appellate jurisdiction, of which revisiona jurisdiction forms a part, the law or equity and rule of goo conscience which the Court in which the proceedings in suc case were originally instituted ought to have applied to suc case. Now, if a High Court cannot grant an injunction unde the terms of the Civil Procedure Code otherwise than in accord-

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1. (1927) 26 L. W. 899.

2. (1931) 35 L. W. 168.

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ance with O. 39, it is certain that neither can a mofussil Court do so; and it is also certain that no mofussil Court exercises powers derived from the Supreme Court. If, then, the High Court deals, as appellate or revisional authority, with a case coming from a mofussil Court, it can only apply such law or equity and rule of good conscience as would be applied by that mofussil Court, and from this it follows that it can only grant an injunction in respect of such a case in accordance with the provisions of O. 39.

Curgenven J. has referred in *Govindarajulu Nayudu* v. *Imperial Bank of India, Vellore*[1] to two Calcutta cases, *Rash Behary Dey* v. *Bhowani Churn Bhose*[2] and *Mungle Chand* v. *Gopal Ram*[3], respectively. But in each of those cases the Calcutta High Court, when it held that it had powers, under its general equity jurisdiction, to grant an injunction independently of the Code of Civil Procedure, was acting in the exercise of its ordinary original civil jurisdiction. The learned Judge has also referred to *Periakaruppan Chettiar* v. *Ramasami Chettiar*[4], which was decided by a divisional bench of this Court. In that case the learned Judges held that the chartered High Courts have power to restrain by injunction a party from prosecuting a suit in a foreign Court (though within the British Empire), but they have not, as far as I understand the decision, held that such power can be used in the exercise of appellate or revisional jurisdiction in cases arising from Courts in the mofussil, and they certainly did not make use of such a power. What happened was that they doubted whether such a power could be exercised by a Subordinate Court, and then, dealing with the facts of the case, which was one that came before them on an appeal from a Subordinate Judge, on the assumption that a Subordinate Court had such power, held that the Subordinate Judge was not warranted in making use of it. The result was that an injunction which the Subordinate Judge had granted was discharged, the petition praying for it being dismissed. In these circumstances I do not think that the decision is an authority for the High Court's having power to grant an injunction in a case that comes before it, on appeal or revision, from a Subordinate Court in the mofussil. Were it such an authority, I should,

1. (1931) 35 L. W. 168.
2. (1906) I. L. R. 34 Cal. 97.
3. (1906) I. L. R. 34 Cal. 101.
4. (1928) 27 L. W. 418.

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of course, be obliged to follow it. I would note that none of the decisions to which it has referred as to the High Court having authority, outside what is provided for in the Civil Procedure Code, to grant an injunction, has to do with cases in which the High Court was not exercising its ordinary original civil jurisdiction. Two of them are the decisions in I. L. R. 34 Calcutta, to which I have already referred. Another is that in *Uderam Kesaji* v. *Hyderally*[1] in which however reliance was placed not only on powers inherited from the Supreme Court but also on inherent powers, with which I am not now concerned in the face of what is the view of this High Court in that connection. Another is *Mulchand Raichand* v. *Gill & Company*[2] and another is *Tikam Chand-Santokchand* v. *Santokchand Singhi*[3], which again is a decision of the Calcutta High Court. All these decisions have to do with cases in which a High Court was acting in the exercise of its ordinary original civil jurisdiction.

The other case referred to in *Govindarajulu Nayudu* v. *Imperial Bank of India, Vellore*[4] is *Singaravelu Mudali* v. *Balasubramania Mudali*[5], in which the decision was by a single Judge, but in that case the injunction was found by the learned Judge to be one that could be brought within the terms of O. 39, R. 2, and his other remarks were not necessary for the decision of the petition that was then before him. Nor has the learned Judge dealt with the provisions of the Letters Patent.

My conclusions are that there is no authority of this Court on the subject now before me which I am bound to follow and that, in the light of S. 21 of the Letters Patent, of which I find no discussion in any decision of this Court that has been brought to my notice, this is not a case in which this Court can grant an injunction. The petition is, therefore, dismissed with costs.

K. C. *Petition dismissed.*

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1. (1908) I. L. R. 33 Bom. 469.
2. (1919) I. L. R. 44 Bom. 283.
3. (1920) 59 I. C. 218.
4. (1931) 35 L. W. 168.
5. (1926) 24 L. W. 421.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Coimbatore Sri Venkatachalapathi Nidhi, Ltd., and others .. *Appellants** (*Plaintiffs and nil*)

v.

G. K. Nanjappa Goundan and others.. *Respondents* (*Defendants 1 to 3 and nil*).

Coimbatore Sri Venkatachalapathi Nidhi, Ltd. *v.* Nanjappa Goundan.

Negotiable Instruments Act (XXVI of 1881), Ss. 79 and 80—Instrument of debt—Interest not mentioned—Claim of interest in the plaint—Operation of S. 80 of the Negotiable Instruments Act not excluded by O. 37, R. 2, Civil Procedure Code.

The operation of S. 80 of the Negotiable Instruments Act (XXVI of 1881) is not excluded by O. 37, R. 2 of the Civil Procedure Code. On the other hand O. 37, R. 2 makes S. 79 or 80, as the case may be, specifically applicable to a case filed under O. 37 of the Civil Procedure Code.

Where a person claimed in the plaint 33⅓ per cent. interest on instruments of debt which contained no agreement as to the exact rate of interest,

Held, interest should be awardable at the rate of 6 per cent. from the date of Hundis to the date of decree and subsequent interest also at the same rate thereafter.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 64 of 1925.

M. Krishna Bharathi for appellants.

S. Ranganadha Aiyar for respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

Madhavan Nair, J.—The plaintiff is the appellant. The suit out of which this appeal arises was instituted by him for the recovery of Rs. 5,000 with interest on 5 Hundis, Exs. A to A-4. A decree has been given in his favour for the principal amount. The learned Judge having refused to award him interest on the principal amount, in this appeal the plaintiff claims that he is entitled to interest.

The suit was instituted under O. 37 of the Civil Procedure Code under the special rules relating to summary procedure on negotiable instruments. Under rule 2 (2) (*a*) of this order the plaintiff is entitled to get interest on the amount claimed in accordance with the provisions of S. 79 or S. 80, as the case may be, of the Negotiable Instruments Act of 1881 up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of

*Appeal No. 20 of 1926. 21st October, 1932.

Coimbatore Sri Venkatachalapathi Nidhi, Ltd. *v.* Nanjappa Goundan.

Madhavan Nair, J.

the decree at the same rate or at such other rate as the Court thinks fit. Since there is no agreement to pay any interest in the documents, S. 79 is obviously inapplicable and so under O. 37, R. 2 (2) (*a*) the plaintiff will be entitled to get only the statutory rate of interest, 6 per cent., under S. 80. But the learned Judge refuses to apply S. 80 because he says that the operation of this section is excluded by O. 37, R. 2. We have read the section carefully. We are not able to see how the operation of S. 80 of the Negotiable Instruments Act is excluded by O. 37, R. 2, Civil Procedure Code. On the other hand, it seems to us that O. 37, R. 2 makes S. 79 or S. 80 as the case may be specifically applicable to a case filed under O. 37. We cannot therefore accept the opinion of the learned Judge that the plaintiff is not entitled to the statutory interest mentioned in S. 80.

It is argued on behalf of the appellant that he is entitled to $33\frac{1}{3}$ per cent. which he has claimed in the plaint. He contends that O. 37, Civil Procedure Code, supports him having regard to the language of R. 2, namely, "the allegations in the plaint shall be deemed to be admitted". We are not able to accept this contention. No authority in support of the plea has been cited. On the other hand it appears to us that that interpretation cannot be accepted, because in rule (*a*) of cl. (2) special provision for interest is made to the effect that S. 79 or S. 80 of the Negotiable Instruments Act will apply as the case may be. Therefore, the admissions of the allegations in the plaint relied upon by the appellant under cl. (2) cannot refer to the award of interest which is specifically provided for in cl. (*a*). We would, therefore, allow the appeal and award interest at the rate of 6 per cent. from the date of the Hundis to the date of the decree and subsequent interest also at the same rate thereafter.

The plaintiff will get his costs in this appeal on the amount which we have decreed to him.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

K. C. Ethirajulu Chettiar .. *Appellant** (*Respondent*)

v.

The Official Receiver, East Tanjore, Negapatam .. *Respondent* (*Petitioner*).

Provincial Insolvency Act (V of 1920), S. 52—Property "in the possession of the Court"—Immoveable property not attached but sought to be sold—Application by interim receiver for stopping sale—Maintainability—Order if appealable—Civil Procedure Code (V of 1908), S. 47.

Ethirajulu Chettiar *v.* The Official Receiver, East Tanjore, Negapatam.

Immoveable property, which has not been attached and which is sought to be sold on the ground that the decree created a charge upon it, cannot be said to be property "in the possession of the Court" within the meaning of S. 52, Provincial Insolvency Act, and an interim receiver cannot apply to have the sale stopped.

Sivasami Odayar v. *Subramania Aiyar*, (1931) I. L. R. 55 Mad. 316: 62 M. L. J. 68, considered.

An interim receiver making an application under S. 52, Provincial Insolvency Act, cannot be said to represent the judgment-debtor and the order passed on such an application cannot be treated as falling within S. 47, Civil Procedure Code, or as amounting to a decree within the meaning of the Code and is therefore not appealable.

Appeal against the order of the Court of the Subordinate Judge of Mayavaram, dated 24th March, 1932 and made in E. A. No. 158 of 1932 in E. P. No. 114 of 1931 (in C. S. No. 164 of 1931 on the file of the High Court, Madras) in its Ordinary Original Civil Jurisdiction.

T. R. Venkatarama Sastri and *K. P. Mahadeva Aiyar* for appellant.

C. A. Seshagiri Sastri and *K. S. Desikan* for respondent.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—The Lower Court has held that the decree is invalid for want of registration under *S. 17 of the Registration Act*, and Mr. Venkatarama Sastri contends that this view is wrong. It is unnecessary to consider this point on account of the opinion we have formed on another question that has been raised.

A few facts bearing on that question may be stated. The appellant filed a suit (C. S. No. 164 of 1931) in the High Court on its Original Side for the recovery of a certain sum of money. That suit was compromised by the defendant agreeing to pay a

*C. M. A. No. 226 of 1932. 3rd October, 1932.

Ethirajulu Chettiar *v.* The Official Receiver, East Tanjore, Negapatam.

Venkatasubba Rao, J.

certain specified amount, which was declared to constitute a charge on some immoveable property. It was also stipulated that in default of payment of the sum the property itself should be sold. In pursuance of this compromise a decree was passed, which after stating that the immoveable property set forth in the schedule thereto should be security for the payment of the amount mentioned went on to provide that in default of payment the plaintiff was to be at liberty to bring the property to sale in execution of the decree itself. This decree was passed in April, 1931, and in June the plaintiff (appellant) got it transferred to the Lower Court for execution as the property charged by the decree was situated within the jurisdiction of that Court. In July, 1931, a petition was filed for adjudicating the defendant an insolvent, and the respondent was appointed interim receiver in the insolvency. In September, 1931, the appellant filed an execution petition in the Lower Court applying for the sale of the property, which was charged by the decree. He also applied that the interim receiver should be impleaded as the 2nd defendant in the suit. The latter did not oppose the application and was accordingly impleaded as a party. The proclamation of sale was in due course settled, and the sale was finally fixed for the 31st March, 1932. In the meantime on the 12th March the interim receiver applied to the executing Court under S. 52 of the Provincial Insolvency Act that the sale should be stopped and that other suitable relief should be granted.

Mr. Venkatarama Sastri on these facts contends that S. 52 is inapplicable. The gist of the interim receiver's application is, that the decree of the High Court was ineffectual, not having been registered and that it did not therefore have the effect of making the plaintiff a secured creditor. The section provides as to what should be done, where a decree being under execution, the executing Court is informed that a petition to declare the judgment-debtor as insolvent has been admitted. The executing Court, the section says, shall direct the property of the debtor, against which execution has issued, if in the possession of the Court, to be delivered to the receiver. Mr. Venkatarama Sastri's contention is that the property in question was not in the possession of the Court and that the section therefore is inapplicable. The words "If in the possession of the Court" have given rise to some difficulty. If what is

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Venkatasubba Rao, J.

attached is moveable property, there can be no doubt that it is the property in the possession of the Court. As immoveable property under the procedure obtaining in India is not attached by seizure, some doubts were expressed whether such property can be said to be property in the possession of the Court. In *Sivasami Odayar* v. *Subramania Aiyar*[1] a Bench of this Court, after referring to *Mahasukh Jhaverdas* v. *Valibhai Fatubhai*[2] and *Haranchandra Chakravarti* v. *Jay Chand*[3], reluctantly came to the conclusion that immoveable property under attachment must be held to come within the terms of the section. But at any rate there is no warrant for holding that property, which is not even attached, is in the possession of the Court. By no fiction of law can it be held, that the property which a judgment-creditor is seeking to bring to sale on the ground that the decree creates a charge upon it, is property in the possession of the Court. S. 52 does not therefore apply, and the Lower Court should not have allowed the interim receiver's application.

A preliminary objection has been taken that the appeal is incompetent. The interim receiver, as I have pointed out, was impleaded as a party to the suit in execution. But his application cannot be treated as falling within S. 47 of the Code of Civil Procedure. In making the application he cannot be deemed to have represented the judgment-debtor; for the right he put forward was a paramount one, being that of the general body of creditors. Mr. Venkatarama Sastri in the circumstances did not seriously contend that this should be treated as an appeal filed from an order made under S. 47, Civil Procedure Code. The interim receiver, by reason of a statutory right conferred upon him by S. 52 of the Provincial Insolvency Act, made the application in question to the Lower Court, and against an order made in such a proceeding, no appeal is provided. Such an order comes neither under S. 47 nor falls within the definition of "decree" in the Code. To give effect to Mr. Venkatarama Sastri's contention, we must be prepared to convert the appeal into a civil revision petition. The question then is, can we in the exercise of our discretion treat this appeal as a civil revision petition? We are prepared to so treat

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1. (1931) I. L. R. 55 Mad. 316: 62 M. L. J. 68.
2. (1927) 30 Bom. L. R. 455.
3. (1929) I. L. R. 57 Cal. 122.

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it, as the Lower Court has infringed the plain provisions of S. 52 and had no jurisdiction to make the order in question.

The order of the Lower Court is accordingly set aside but in the circumstances we direct the appellant to pay the respondent's costs of this appeal.

Reilly, J.—I agree.

B. V. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE MOCKETT.

Nukala Venkatanandam and others .. *Petitioners** (*Appellants in Appeal No. 156 of 1932 on the file of the High Court*).

Venkatanandam, *In re.*

Court Fees Act (VII of 1870), Ss. 7 (iv) (f) and 11—Suit for accounts—Appeal—Court-fees whether can be paid on notional valuation—Appellate Court awarding larger relief—Mode of collecting deficient Court-fee

Where the appeal arises out of a suit for accounts the appellant, whether plaintiff or defendant, is in the same position as the plaintiff in the Court of first instance and can pay Court-fee on a notional valuation given by him.

Faizullah Khan v. *Mauladad Khan*, (1929) L. R. 56 I. A. 232: I. L. R. 10 Lah. 737: 57 M. L. J. 281 (P. C.), relied on.

C. K. Ummar v. *C. K. Ali Ummar*, [illegible] I. L. R. 9 Rang. 165 (F. B.), referred to.

In the case of suits for accounts S. 11 of the Court Fees Act only furnishes one method for protecting the interests of the Crown. The proper procedure, if the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a larger amount than what he has paid Court-fees for, would be to post the case for orders and direct the appellant to pay additional Court-fee and only then the judgment should be delivered and the decree allowed to be drawn up.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the value of the appeal (Appeal No. 156 of 1932 preferred to the High Court against the final decree, dated 22nd December, 1931, in O. S. No. 9 of 1922 on the file of the Court of the Subordinate Judge of Cocanada), at Rs. 5,500 and to accept the Court-fee of Rs. 447-7-0 paid already as correct.

P. Somasundaram for petitioners.

K. Subba Rao for *The Government Pleader* (*P. Venkataramana Rao*) on behalf of the Government.

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*C. M. P. No. 3400 of 1932. 5th October, 1932.

The Court made the following

ORDER. *Ramesam, J.*—The question arising for decision in the above Civil Miscellaneous Petition relates to Court-fees in a partnership suit. The facts of the case are as follows:—A suit was filed in the Subordinate Judge's Court of Cocanada for dissolution of partnership, for settlement of accounts and for recovery of such amounts as may be due to the plaintiffs. Under S. 7 (*iv*) (*f*) of the Court Fees Act, the plaintiff tentatively valued his plaint at Rs. 7,500. A decree was passed on 22nd December, 1931, under which defendants 3 to 5 were directed to pay certain sums of money with interest at 6 per cent. from 1st April, 1924. The defendants 3 to 5 filed the present appeal on 26th April, 1932. In the memorandum of appeal the valuation is stated to be Rs. 12,770-6-0 and the Court-fee thereon as Rs. 847-7-0, but the Court-fee actually paid was only Rs. 447-7-0. In the affidavit filed on behalf of the appellants it is stated that the valuation was calculated according to the old practice and was stated to be Rs. 12,770-6-0. But as the 1st appellant had not the money with him at the time, it was filed on a Court-fee of Rs. 447-7-0 with the idea of supplying the deficient Court-fee afterwards. Both according to the affidavit and on the face of the appeal memorandum, the appeal was filed on a deficient Court-fee and the office ought to have returned the papers for supplying the deficit; but by some oversight the office did not return the papers. The appeal was numbered as Appeal No. 156 of 1932. From one point of view it may well be said that the appellants may as well have kept quiet. But there is the apprehension that when the appeal comes on for hearing, the matter will be noticed by the opposite side or by the Court and the appellants would naturally be called upon to supply the deficit Court-fee. The 1st appellant, therefore, not wishing to wait until then and desiring to put the matter on a proper legal basis, filed the present petition. He now wishes to revise the valuation in such a way that the Court-fee already paid would be adequate until the hearing of the appeal. It may be that after the hearing of the appeal he may have to pay more Court-fees if he succeeds in respect of an amount larger than the amount for which the Court-fee he has now paid, namely, Rs. 447-7-0, suffices, that is, Rs. 5,500. In the affidavit it is stated that they were expecting the papers to be returned

Venkatanandam, *In re.*

Ramesam, J.

so that they may correct the valuation and re-present the papers. But unfortunately the papers were not returned.

If the only valuation which is possible for the appeal is Rs. 12,700, then of course, he cannot do this. But it is contended on the footing of the Privy Council decision in *Faizullah Khan* v. *Mauladad Khan*[1], that even in an appeal relating to the accounts of a partnership a tentative valuation can be given by the appellant under S. 7 (*iv*) (*f*) of the Court Fees Act. In that case the plaintiff filed a suit on a valuation of Rs. 3,000, but the first Court gave a decree against him for Rs. 19,991. The plaintiff filed an appeal in which he paid Court-fees on the said sum of Rs. 19,991. But in the memorandum of appeal he prayed that the decree against him should not only be vacated but that he should also get a decree for Rs. 3,000. The Privy Council held that the amount actually paid is good enough for covering both the reliefs. In the judgment Lord Shaw said:

"Their Lordships find no reason for treating that payment as upon either an under value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach, and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other."

The view apparently taken by their Lordships is that the appellant can pay Court-fee on a notional valuation as in the first Court. Even if some of the sums in respect of which he was appealing are definite amounts, the actual Court-fee he pays should be supposed to cover any actual sums decreed and any uncertain sums in respect of which relief is sought. That this is the view taken by their Lordships is clear from the observations of Lord Tomlin in the course of the argument reported in *Faizullah Khan* v. *Mauladad Khan*[2] and quoted by Page, C. J., in *C. K. Ummar* v. *C. K. Ali Ummar*[3], as follows:—

"In S. 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course, if the appellant recovers more, he pays the extra

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1. (1929) L. R. 56 I. A. 232: I. L. R. 10 Lah. 737 : 57 M. L. J. 281 (P.C.).
2. (1929) 31 Bom. L. R. 841 at 842 (P. C.).
3. (1931) I. L. R. 9 Rang. 165 at 168 (F. B.).

fee under S. 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount. In suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover. The Legislature, therefore, leaves it open to him to estimate the amount. That is the scheme of the Act."

According to the view of the Privy Council, the appellant, whether plaintiff or defendant, can give some valuation and one cannot complain that the amount in the memorandum is not the proper amount, the reason being that in suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover, and they apply this principle to appeals also. The question that arises is, if appellants can file their appeals on any valuation they like and pay Court-fees on it and the whole case can be heard on such payment, and if as the result of the hearing of the appeal, he can succeed for a much larger amount than the amount for which he paid Court-fees, can it not be said that the Crown has been deprived of the Court-fee properly due and if so, how is this amount to be recovered. Lord Tomlin referred to S. 11 of the Act, but it seems to me that S. 11 may not give adequate remedy to the Crown, for S. 11 refers to execution and before the decree-holder seeks execution, he must pay the Court-fee. But suppose the party settled the matter privately and the decree-holder had not to seek execution, would not the Crown be deprived of the proper Court-fees in such a case? S. 11 no doubt furnishes one method but for the protection of the interests of the Crown, it is necessary to indicate what the proper practice should be. If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid Court-fees for, the proper thing would be to post the case for orders and direct the appellant to pay additional Court-fee and only then the judgment should be delivered and the decree should be allowed to be drawn up. I think this protects the Crown's interests properly. Under S. 149, Code of Civil Procedure, the Court has got the power to direct the payment of Court-fees at any stage of the case and this is expressly relied on by Lord Shaw at page 743 of the Lahore judgment. In the present appeal the appellant does not want any refund of his Court-fee. He simply wants permission to re-state his valuation tentatively at Rs. 5,500 so that the Court-fee actually paid may be enough and so that no objection can

Venkatanandam, *In re.*

Ramesam, J.

be taken to the hearing of the appeal afterwards. He himself would have done this, if the appeal papers had been returned; but they were not. In the view taken in the Privy Council decision we direct the valuation to be amended tentatively at Rs. 5,500, but as already mentioned, it must be understood that when the appeal is heard and he succeeds to a larger amount, unless the Court-fee is paid, the judgment and decree ought not to be issued.

In view of the decision of the Privy Council no purpose is served by referring to the earlier decisions. In the case of appeals against a preliminary decree only, the Madras High Court held that where a defendant appeals he should pay on the tentative valuation of the plaintiff in the first Court but the Privy Council decision seems to imply that the defendant can give his own tentative valuation in appeal. This is the way how the Privy Council decision with Lord Tomlin's observations are construed by Page, C. J., in *C. K. Ummar* v. *C. K. Ali Ummar*[1] and I agree with his view. He points out that the same view was taken by the Allahabad High Court in *Chunni Lal* v. *Sheo Charan Lal, Lalman*[2] but that was before the Privy Council decision. It is unnecessary to refer to the decision of Rankin, C. J., in *Kantichandra Tarafdar* v. *Radharaman Sarkar*[3] in which no reference was made to the Privy Council decision nor could it be, for the report could not have reached India at the time the case was heard. I may add that an appellant, whether defendant or plaintiff, is in the position of a plaintiff in appeal at least in suits for taking accounts of a partnership and in partition suits. In such suits it has been held that every party is in the position of a plaintiff—vide *Tirumedi Adeyya* v. *Cheluhuin Venkatregadu*[4] and *Ramamurthi* v. *Surampalli Reddy*[5]. In the first of the above cases the defendant actually paid Court-fee on the footing that his position is analogous to that of the plaintiff. In the latter case it was observed that the effect of the plaintiff being allowed to withdraw was to allow defendants 8 to 10 to become plaintiffs in his stead.

1. (1931) I. L. R. 9 Rang. 165 (F. B.).
2. (1925) I. L. R. 47 All. 756.
3. (1929) I. L. R. 57 Cal. 463.
4. 1914 M. W. N. 155.
5. (1920) 12 L. W. 563.

The valuation of the appeal for the present will be regarded as Rs. 5,500.

Mockett, J.—I agree.

B. V. V. *Order made.*

Venkatanandam, *In re.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Thangachi Ammal .. *Petitioner* (Plaintiff)*

v.

Mohamed Moideen Maricair .. *Respondent (Defendant).*

Thangachi Ammal *v.* Mohamed Moideen Maricair.

Court Fees Act (VII of 1870 as amended by Madras Act V of 1922), S. 7 (iv-A) and (v)—Suit for cancellation of sale deed and for possession—Prayer for possession if ancillary to main claim—Court-fee payable.

Where the suit was for the cancellation of a sale deed executed by the plaintiff and for recovery of possession of the land and mesne profits, and the plaintiff paid Court-fee for the cancellation of the sale deed on the amount of the consideration specified in the deed and also paid Court-fee on the mesne profits,

Held, that the claim for recovery of possession was merely ancillary to the main claim, namely, setting aside the sale deed, and that separate Court-fee was not payable in respect of the prayer for possession.

Lakshmi Ammal, In re, (1925) 49 M. L. J. 608, *Venkatasiva Rao* v. *Satyanarayanamurthy,* (1932) 63 M.L.J. 764 and *Rajagopala* v. *Vijayaraghavalu,* (1914) I. L. R. 38 Mad. 1184, referred to.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur, dated 5th February, 1932 and made in O. S. No. 37 of 1931.

K. S. Desikan for petitioner.

K. S. Champakesa Aiyangar for respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. The question raised in the case is whether the Court-fee paid by her is sufficient.

The suit was for cancellation of a sale deed executed by the plaintiff and for recovery of possession of the land and mesne profits. The consideration for the sale deed was Rs. 2,750. The petitioner paid Court-fee for the cancellation of the sale deed on the amount of the consideration specified in the deed under S. 7 (*iv-A*) of the Court Fees Act. She also paid Court-fee on the mesne profits. The defendant's contention is that

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*C. R. P. No. 365 of 1932. 4th October, 1932.

Thangachi Ammal v. Mohamed Moideen Maricair.

the petitioner should pay Court-fee in respect of the claim for possession of the property also.

The point for decision is whether the plaintiff is bound to pay Court-fee in respect of the claim for recovery of possession of the land from the defendant. The Lower Court held that the plaintiff should pay Court-fee for possession as well under S. 7 (*v*) of the Court Fees Act. S. 7 (*iv*) of the Court Fees Act has been amended in 1922 and cl. (*iv-A*) has been newly introduced by the amendment. It states "In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value," the Court-fee should be calculated "according to the value of the subject-matter of the suit, and such value shall be deemed to be etc.". Prior to this amendment suits like the present one fell under S. 7 (*iv*) (*c*); that is, for purposes of Court-fee such suits were considered as suits to obtain a declaratory decree or order where consequential relief is prayed. It is not disputed that the plaintiff has to pay Court-fee so far as the setting aside of the sale deed is concerned under cl. (*iv-A*) of the section. The only question is whether besides paying Court-fee under cl. (*iv-A*) the petitioner should be compelled to pay Court-fee under S. 7 (*v*) also. No decision directly bearing on the point has been brought to my notice. Though the question has not been specifically decided in any case, some decisions of this Court may with advantage be referred to, those being ***Lakshmi Ammal,*** In re[1] and ***Venkatasiva Rao*** v. ***Satyanarayanamurthy***[2]. Of these two, the first one ***Lakshmi Ammal,*** In re[1] is very much like the present case though the particular point now argued does not seem to have been specifically raised in that case. The present suit, as I have already stated, is one by a vendor to set aside a sale deed and for the recovery of possession of the property covered by the deed. The suit in ***Lakshmi Ammal,*** In re[1] was by the vendee. That was also for setting aside a sale deed. The relief asked for was the return of the consideration and some damages. It was argued in that case that the suit should be valued as one falling under S. 7 (*iv*) (*c*), *i.e.*, for the purpose of Court-fee it should be treated as a suit for a declaratory decree where consequential relief is prayed. Having regard to the prayer for

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1. (1925) 49 M. L. J. 608.

2. (1932) 63 M. L. J. 764.

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cancellation of the document and the new amendment introduced by the legislature in 1922, Devadoss, J., held that the suit should be valued under S. 7 (*iv-A*). Should it be valued also under S. 7 (*v*) with regard to the return of the money does not seem to have been specifically argued. But it was urged that under S. 7 (*iv*) (*c*) the plaintiff is bound to value the relief sought for at Rs. 1,300, *i. e.*, the amount so claimed. With regard to this argument the learned Judge pointed out "the main relief claimed is really the setting aside of the conveyance and the claim for money is only ancillary to it. To such cases S. 7 (*iv*) (*c*) has no application". And then the learned Judge held that the new clause applied to the case. In the same way it may be said in this case also that the claim with regard to the possession of the property is ancillary to the setting aside of the document and, if so, S. 7 (*iv-A*) is the only provision under which the Court-fee has to be levied. In *Venkatasiva Rao* v. *Satyanarayanamurthy*[1] a decree was sought to be set aside and possession as a result of such setting aside of the decree was also asked for. The learned Judges held that the case fell under both S. 7 (*iv-A*) and S. 7 (*v*). But they did not say that both the provisions applied to the case and that the plaintiff should pay Court-fee under the two provisions. No doubt the point was not specifically raised in the case as I have already pointed out. Some support for the position contended for by the petitioner may be found in *Rajagopala* v. *Vijayaraghavalu*[2], though the question of court-fee in that case arose before the amendment of the Act in 1922. That was a suit for a declaration that a certain decree was of no legal effect and for possession of the properties. Under the present Act the suit would be one for cancellation of the decree and for possession of the properties. The learned Judges in the course of their judgment pointed out with reference to the claim of possession in that case that "Possession is not asked for on any other ground than that the decree, in execution of which it was lost, should be declared invalid; and it is therefore asked for consequently on the grant of declaration." Using a similar language it may be said in the present case that possession is not asked for on any other ground than that the sale deed by the execution of which it was lost should be set aside and it is therefore asked for consequently on the

1. (1932) 63 M. L. J. 764. 2. (1915) I. L. R. 38 Mad. 1184.

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setting aside of the sale deed or in other words as mentioned by Devadoss, J., in *Lakshmi Ammal*, In re[1], the claim with respect to possession is only ancillary to the main claim which is the setting aside of the sale deed.

For the above reasons I am of opinion that in this case the petitioner need not pay Court-fee on the relief with regard to possession. The order of the Lower Court is set aside with costs here and in the Court below.

B. V. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

The Official Liquidator of the Bellary Electric Supply Company, Ltd., in liquidation .. *Appellant** (*Counter-petitioner*)

v.

Kanniram Rawoothmal .. *Respondent* (*Respondent—Petitioner-creditor*).

The Official Liquidator of the Bellary Electric Supply Co., Ltd. *v.* Kanniram Rawoothmal

Company—Application by a shareholder for shares after deposit of money—Allotment of shares not communicated—Subsequent liquidation of company—Claim for refund—Presumption of allotment on account of entry in company's register, whether raised—S. 40 of Indian Companies Act—Interest on deposit from which date recoverable.

Where a shareholder deposited money with a company and applied for a certain number of shares and no share certificate was admittedly issued in respect of the shares applied for nor was a letter of allotment sent to him and the company itself subsequently went into liquidation while the applicant called upon the Official Liquidator to refund the money he had deposited because no allotment of shares had been made to him,

Held, that there was no allotment of shares made and hence the shareholder was entitled to be refunded.

The mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares was in fact made. An application for shares is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer.

In re *The Universal Banking Corporation*, (1867) L. R. 3 Ch. App. Cases 40, followed.

Held, also, that interest on the money was only recoverable from the date of demand by the applicant.

Nanchappa Koundan v. *Ittichathara Mannadiar*, 1930 M. W. N. 438, referred to.

Appeal against the order of the District Court of Bellary, dated 11th December, 1928 and made in I. A. No. 382 of 1928

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*C. M. A. No. 263 of 1929. 9th September, 1932.

1. (1925) 49 M. L. J. 608.

in O. Ps. Nos. 1 and 19 of 1926 on the file of the High Court, Madras.

The Official Liquidator of the Bellary Electric Supply Co., Ltd. v. Kanniram Rawoothmal

Mockett, J.

V. S. Narasimhachariar for appellant.

C. S. Venkatachariar and *L. Krishna Doss* for respondent.

The judgment of the Court was delivered by

Mockett, J.—The relevant facts in this appeal are that the Respondent's firm purchased 110 shares in the Bellary Electric Supply Co., Ltd., at some time previous to October 14, 1925 and that on that date on behalf of his firm the Respondent deposited Rs. 1,400 with the company in respect of 140 more shares. The application for the 140 shares Ex. I, dated October 14, 1925, contains the words "I request you to allot me" 140 shares. No share certificate was admittedly issued in respect of the 140 shares nor was a letter of allotment sent. The company went into liquidation on a date subsequent to October 14, 1925, and the Respondent now calls upon the Official Liquidator to refund the Rs. 1,400 because no allotment of shares had been made to him. The Official Liquidator contends that there was such an allotment. The learned District Judge found after an elaborate examination of the facts and the documents that there was no allotment. The short point is: was there an allotment? The Respondent filed an affidavit setting out the above facts. No counter-affidavit was filed. At the hearing two witnesses were called. The Respondent (there the Petitioner) examined one S. M. Hussain once Managing Director of the Bellary Electric Supply Company. He stated that the Members' Register, Ex. II, which purported to show that on 14th October, 1925, 140 shares were allotted to the Respondent could not in fact be relied upon as the rubber stamp of the company was not placed upon the Respondent's page nor did it appear on Ex. III, the Members' Register. The appellant examined a clerk of the company who states that although the allotment was authorised by the Managing Director and the entries made in Ex. II "the applicant was not notified of the allotment". The appellant relies on S. 40 of the Indian Companies Act "The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein" and argues that Ex. II raises a presumption of allotment which the Respondent (who did not give evidence) has not rebutted. The Respondent could of course have been cross-

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examined on his affidavit but the appellant did not give him notice to appear for this purpose. Any presumption under S. 40 was clearly rebutted by the evidence of the above two witnesses.

But apart from this aspect of the case there is ample authority for the proposition that the mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares was in fact made. An application for shares is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer. No Indian case in point has been cited but in *The Universal Banking Corporation*, In re[1] it was held that the principles governing the formation of a contract between a company and a member of the public are identical in principle to those regulating the contractual relations between individuals. The facts in the above case are sufficiently similar to the facts in this appeal and it was held that a shareholder to whom the fact that an allotment of shares had been made had not been communicated was not bound by any contract. The mere entry of his name on the register was held not sufficient for this purpose. We therefore agree with the decision of the learned District Judge.

The Lower Court has allowed the petitioner interest at 6 per cent. from October 14, 1925, and the appellant contends that interest should be payable only from the date of demand. We think that this contention must prevail. The law relating to the payment of interest is dealt with in *Nanchappa Koundan* v. *Ittichathara Mannadiar*[2], the effect of which is that the provisions of the Interest Act are all comprehensive and interest can only be allowed in accordance therewith. Applying that principle it is clear that this payment of Rs. 1,400 cannot be construed to be "a debt or sum certain payable at a certain time . . . . by virtue of a written instrument." It is payable otherwise (*i. e.*, as money had and received) and interest is therefore only recoverable from the date of demand, that is, Petition, 27th July, 1928. We therefore vary the decree of the Lower Court to this extent and with this variation dismiss this appeal with costs here and as decreed in the Lower Court.

Appeal dismissed with slight variation of the decree.

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1. (1867) L. R. 3 Ch. App. Cases 40. 2. 1930 M. W. N. 438.

PRIVY COUNCIL.

[On appeal from the Supreme Court of Canada.]

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT AND SIR GEORGE LOWNDES.

Alice Marie Vandepitte .. *Appellant**

v.

The Preferred Accident Insurance Company of New York .. *Respondents.*

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British Columbia Insurance Act (Ch. XX of 1925), S. 24—Interpretation—Insurance of motor-car and third party risk—Indemnity extended by policy to any one driving with permission of insured—Damage caused by daughter of insured—Right of third party to recover against insurer under S. 24.

The appellant claimed compensation for injuries sustained in a collision with a motor-car driven by *J*, the daughter of Berry, who had insured with the respondents. Under S. 24 of the British Columbia Insurance Act, "where a person incurs liability for injury or damage and is insured against such liability, the person entitled to the damages may recover by action against the insurer". It was contended for the appellant that by virtue of the last clause in the policy extending the indemnity "to any person while riding in or operating the automobile with the permission of the insured," *J* was "insured" within the meaning of S. 24 of the Act and hence the respondents were liable to compensate the appellant.

Held, (*i*) that no one could claim the benefit of the policy, even if answering the general description, unless it was established that the person who directed the insurance to be affected actually *intended* to cover that particular person or at least some one who should answer the description. There was no evidence of any such intention and the mere generality of the language was not in itself sufficient;

(*ii*) that though a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party, there again the intention to constitute the trust must be affirmatively proved: it cannot necessarily be inferred from the mere general words of the policy;

(*iii*) that Berry had no insurable interest in *J's* (his daughter's) personal liability and so the policy, in respect of such a risk, was void under the statute;

(*iv*) that in short, S. 24 was satisfied only by a contract at law, enforceable directly against the insurers by the insured in his own name and not by an equitable right in *J* (even if it were constituted) enforceable only in the name of the statutory insured (Berry), that *J* was not "insured" within the meaning of S. 24 which the appellant was not, therefore, entitled to invoke.

D. N. Pritt, K. C. and *Wilfrid Barton* for appellant.

W. N. Tilley, K. C. and *Alfred Bull* for respondents.

4th November, 1932. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The appellant, Alice Marie Vandepitte, sustained injuries on the 5th March, 1928, owing to the motor-

*P. C. Appeal No. 11 of 1932. 4th November, 1932.

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car, in which she was a passenger and which her husband was driving, being involved in a collision with a motor-car driven by Jean Berry. Jean Berry was the daughter of R. E. Berry and was driving the car which was her father's property, with his permission. As she was a minor living with her father, he was civilly liable, under S. 12 of the Motor Vehicles Amendment Act, 1927, of British Columbia, for injuries sustained by the appellant due to his daughter's negligence, but in the case the appellant brought her action in the Supreme Court of British Columbia against Jean Berry, claiming that she was injured by Jean Berry's negligent driving. In the proceedings, the appellant's husband, E. J. Vandepitte, was brought in as third party. On the 13th June, 1928, judgment was given for the appellant for $4,600 and costs against Jean Berry, and for Jean Berry against E. J. Vandepitte for $2,300 and costs on the basis that both drivers were negligent in the same degree. The appellant issued an execution against Jean Berry, but it was returned unsatisfied. Thereupon, on the 20th May, 1929, the appellant brought the present action in the Supreme Court of British Columbia, against the respondents, claiming to recover $5,648.71, the amount of the judgment and costs, in virtue of S. 24 of the Insurance Act of British Columbia (Chapter 20 of 1925). The appellant succeeded in the Supreme Court and on appeal in the Court of Appeal of British Columbia, but in the Supreme Court of Canada the respondents' appeal was allowed, and the appellant's action was dismissed with costs throughout. From that judgment the matter comes on appeal by special leave before their Lordships.

S. 24 of the Insurance Act (Chapter 20 of 1925) is in the following terms:—

"Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

S. 10 is as follows:—

"(1) Every contract by way of gaming or wagering is void. (2) A contract is deemed to be a gaming or wagering contract where the insured has no interest in the subject-matter of the contract."

Part VII of the Act contains special provisions relating to automobile insurance, among which is S. 152, which provides

that no insurer shall make a contract for a period exceeding 14 days without a written application therefor, signed by the applicant or his agent duly authorised in writing, and sets out the particulars required: S. 153 is in the following terms:—

"Every policy shall contain the name and address of the insurer, the name, address, and occupation or business of the insured, the name of the person to whom the insurance-money is payable, the premium or other consideration for the insurance, the subject-matter of the insurance, the indemnity for which the insurer may become liable, the event on the happening of which such liability is to accrue, and the term of the insurance."

Section 154 contains statutory conditions which are to be deemed to be part of any contract in force in the Province and to be printed on every policy, including paragraph 8, which reads as follows:—

"(1) Upon the occurrence of an accident involving bodily injuries or death, or damage to property of others, the insured shall promptly give written notice thereof to the insurer, with the fullest information obtainable at the time. The insured shall give like notice, with full particulars of any claim made on account of such accident, and every writ, letter, document or advice received by the insured from or on behalf of any claimant shall be immediately forwarded to the insurer.

"(2) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceeding, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal.

"(3) No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements are complied with and such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer, and no such action shall lie in either event unless brought within one year thereafter."

The policy here in question was for a period from noon on 14th April, 1927 to noon on 14th April, 1928. It was issued on a form of application as required by the statute, signed by R. E. Berry as the insured. The policy was headed "Combination Automobile Policy No. A. 12498," and embodied contracts between the insured R. E. Berry and two separate insurance companies, the New Jersey Insurance Company and the Preferred Accident Insurance Company, the respondents. It embodied the terms of the application by R. E. Berry and the Statutory Conditions. Sections A, B and C defined the obligations of the former company in respect of damage to or loss of the insured automobile, and Section D defined the same company's obligation in respect of "legal liability for damage to property of others," which was expressed to be to indemnify

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the insured against loss by reason of the legal liability imposed by law upon the insured "in respect of damage done to property." Section E embodied the obligations of the respondents and was in the following terms:-

"*Section E.—Legal Liability for Bodily Injuries or Death.*—(1) To indemnify the Insured against loss from the liability imposed by law upon the Insured for damages on account of bodily injuries (including death, at any time resulting therefrom) accidentally suffered or alleged to have been suffered by any person or persons . . . . . . as a result of the ownership, maintenance or use of the automobile; provided that on account of bodily injuries to or the death of one person the Insurer's liability under this section shall not exceed the sum of FIVE THOUSAND DOLLARS ($5,000.00), and subject to the same limit for each person the Insurer's liability on account of bodily injuries to or the death of more than one person as the result of one accident shall not exceed the sum of TEN THOUSAND DOLLARS ($10,000.00).

"(2) To serve the Insured in the investigation of every accident covered by this Policy and in the adjustment, or negotiations therefor, of any claim resulting therefrom.

"(3) To defend in the name and on behalf of the Insured any civil actions which may at any time be brought against the Insured on account of such injuries, including actions alleging such injuries and demanding damages therefor, although such actions are wholly groundless, false or fraudulent, unless the Insurer shall elect to settle such actions.

"(4) To pay all costs taxed against the Insured in any legal proceeding defended by the Insurer; and all interest accruing after entry of judgment upon such part of same as is not in excess of the Insurer's limit of liability, as hereinbefore expressed.

"(5) To reimburse the Insured for the expense incurred in providing such immediate surgical relief as is imperative at the time such injuries are sustained."

The final clause of the policy was as follows:—

"The foregoing indemnity provided by Sections D and/or E shall be available in the same manner and under the same conditions as it is available to the Insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the Insured, or of an adult member of the Insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection of the named Insured, and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the named Insured shall in writing direct."

It was contended on behalf of the appellant that under the policy, and in the events which happened, Jean Berry was the insured within S. 24 of the Act, and hence that the respondents were liable to pay the appellant the amount of the loss. The contention was put in the alternative, either that Jean Berry was directly and in law a party to the contract being within the description of the persons other than R. E. Berry to whom the indemnity was available or that if not in law a party to the contract, she was a *cestui que trust* of the promise contained in

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the contract to extend the indemnity to such a person as herself, R. E. Berry having so stipulated as trustee. There is a further contention based on estoppel which may be considered separately and later.

The first mode of stating the appellant's case involves that R. E. Berry as his daughter's agent made a contract of insurance between her and the respondents. But a contract can only arise if there is the *animus contrahendi* between the parties: there is here no evidence that Jean Berry ever had any conception that she had entered into any contract of insurance. She certainly took no direct part in the conclusion of whatever contract there was: the policy was entirely arranged between R. E. Berry and the respondents and he alone filled in and signed in his own name and behalf the application required by S. 152 of the Statute. It is said that the wide words defining the persons to whom the indemnity is available are sufficient to found the inference that R. E. Berry was intending to contract not only on behalf of himself but of any one who might come within the policy words "any person or persons while riding in or legally operating the automobile for private or pleasure purposes" with the appropriate permission, and reliance in support of this contention was placed on the well-known rule in regard to marine policies in which only the name of the agents need be stated, and which are expressed to be made by them "as agents" or more frequently "as well in their own name as for and in the name or names of all and every person to whom the same doth may or shall appertain in whole or in part." But even under these wide words no one can claim the benefit of the policy, even if answering the general description, unless it is established that the person who directed the insurance to be effected actually intended to cover that particular person, or at least some one who should answer the description. The mere generality of the language is not in itself sufficient. Thus in *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co.*[1] it was held that the policy only protected the owner and not the mortgagees: the rule had been previously illustrated by many cases, including *Boston Fruit Co.* v. *Brit. and Foreign M. I. Co.*[2] and also by *Yangtsze Insce.-Ass.* v. *Lukmanjee*[3]. In the present case there is no evidence that

1. (1924) A.C. 294. 2. (1906) A.C. 336. 3. (1918) A.C. 585.

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R. E. Berry had any intention to insure anyone but himself: even if in some cases the words of the policy taken with the surrounding circumstances might be held to found the necessary inference of intention that inference would fail here by reason of the statutory application. But even if he had so intended, he had no authority from Jean Berry to insure on her behalf and at no time did she purport to adopt or ratify any insurance even if made on her behalf. In these circumstances it is impossible to say that a contract existed between Jean Berry and the respondents, that is, it cannot be held that she was in law "insured" under the policy. This conclusion is arrived at quite apart from the provision of S. 153 of the statute, which requires the insured's name and other particulars to be inserted in the policy. It is also arrived at apart from the form of the policy, which throughout in referring to the insured, refers back as a matter of construction to the named insured R. E. Berry, who filled in the statutory application form. The very clause on which the contention is based draws a pointed distinction merely as matter of words between "the insured" and "any person or persons riding, etc.," and between the named insured and "the other persons entitled to indemnity under the terms of this section." Furthermore there was no consideration proceeding from Jean Berry.

It is, however, argued on behalf of the appellant that even if their Lordships should hold, as they do, that Jean Berry was not a party in law to the insurance contract, she was a party in equity, and in that way was "insured" by the respondents within the meaning of S. 24. These two steps of the argument require separate consideration.

The contention firstly is that R. E. Berry, as part of the bargain and for the consideration proceeding from him, stipulated that the respondents should indemnify his daughter, Jean Berry, as coming under the general words of description, in the same manner and under the same conditions as himself, that is, that he created a trust of that chose in action for her as beneficiary. It cannot be questioned that abstractly such a trusteeship is competent. No doubt at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds: the rule is stated by Lord Haldane in

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Dunlop Pneumatic Tyre Co., Limited v. *Selfridge & Co., Limited*[1]:—

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam.*"

In that case, as in *Tweddle* v. *Atkinson*[2], only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases, as for instance, *Robertson* v. *Wait*[3], *Affreteurs Reunis* v. *Leopold Walford*[4], *Lloyd's* v. *Harper*[5], viz., that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant. But, though the general rule is clear, the present question is whether R. E. Berry can be held in this case to have constituted such a trust. But here again the intention to constitute the trust must be affirmatively proved: the intention cannot necessarily be inferred from the mere general words of the policy. Thus in *Irving* v. *Richardson*[6] a mortgagee effected in the usual form an insurance on the full value of the ship. He claimed to recover the full amount, which was in excess of the mortgage debt, on the general principle now embodied in S. 14 (2) of the Marine Insurance Act, 1906, that a mortgagee may insure on behalf and for the benefit of other persons interested as well as for his own benefit, "and recovering the whole, will hold the surplus beyond his own debt in trust for the mortgagor or other persons interested." It was held that the plaintiff was not entitled beyond the extent of his interest, that is, the mortgage debt, because he did not satisfy the jury of his actual intention in effecting the insurance to cover more than that. In the present case, there are not only the difficulties arising

1. (1915) A.C. 847 at 853.
2. (1861) 1 B. & S. 393: 121 E.R. 762.
3. (1853) 8 Ex. 299.
4. (1919) A.C. 801.
5. (1880) 16 Ch. D. 290.
6. (1831) 2 B. & Ad. 193: 109 E.R. 1115.

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from the statutory provisions quoted above, but there is no evidence that R. E. Berry had any intention to create a beneficial interest for Jean Berry, either specifically or as member of a described class. Indeed, at no time either when the policy was effected or before or after the accident is there any suggestion that R. E. Berry had any such idea. It is true that she was in the habit of driving the insured automobile, but if R. E. Berry read the clause or thought of the matter at all, he would naturally expect that if she did damage the claim would, under the Act quoted, be against him, as she was a minor living in his family. There is a further difficulty in the appellant's way under this head: R. E. Berry is the contracting party in law, but he has no insurable interest in Jean Berry's personal liability, since natural love and affection does not give such an interest in law: whenever she drove the car, if she was an insured person, she had an insurable interest in the chance that she might be held liable in damages for negligence, but on the assumption now being considered, *viz.*, that she was no more than a *cestui que trust* in regard to the insurance, the contracting party was R. E. Berry, who had no insurable interest: hence the policy, in respect of that particular risk, was void under the express words of S. 10 of the statute cited above. No doubt it has been held as a special rule in certain cases that a person having a special property in goods can insure on behalf and for the benefit of other persons interested as well as for his own benefit as is illustrated by S. 14 (2) of the Marine Insurance Act, 1906, and *Waters* v. *Monarch Life Co.*,[1] but here no question of a special property in goods was involved: R.E. Berry had no insurable interest in the possible liability of his daughter. But if it is to be said that the *cestui que trust* is to be treated as if in law the contracting party, then Jean Berry must have satisfied the requirements of the Statute, as being the " insured," in particular Ss. 152 and 153, which it cannot be said that she did. There is a further objection to applying to her case the idea of her being the *cestui que trust* under the policy, since the doctrine of the equitable interest of a beneficiary under a contract of a third party relates to benefits under the contract, whereas in an insurance such as that contended for serious duties and obligations rest on any person claiming to be insured, which necessarily involve consent and privity of contract.

1. (1856) 5 El. & Bl. 870: 119 E.R. 705.

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Their Lordships are of opinion that no trusteeship is here made out, but in any case, they could not hold that the provisions of S. 24 were satisfied by any but a contract at law, enforceable directly against the insurers by the insured in her own name. That section must be read with the relevant sections of the Act, which have been quoted above and also with the terms of the policy. In their Lordships' opinion, an equitable right in Jean Berry (even if it were constituted) enforceable only in the name of the statutory insured, R. E. Berry, would not satisfy S. 24, which involves an added burden on the insurance company, and must be strictly construed.

A decision of Roche, J., in *Williams* v. *Baltic Insurance Association of London*,[1] has been relied on by the appellants' counsel. The facts in that case and the contractual terms were however different from those in question here and the provisions of the relevant statutes were not the same: nor is it clear whether the learned Judge treated the driver of the car as directly insured or as a *cestui que trust*. Their Lordships have not been able to derive from that case any principles helpful to the issue now before the Board.

The decision their Lordships have arrived at involves the conclusion that the final paragraph of the policy gives no enforceable right to anyone. The clause constitutes, in their opinion, merely a promissory representation or statement of an intention on the part of the insurers not binding in law or equity. On the other hand " honour policies " are common in insurance business, and any insurance company which failed to fulfil its " honourable obligations " would be liable to pay in loss of business reputation. The defence in the present case is however taken under somewhat unusual circumstances in a claim by strangers on a special statutory enactment: neither Jean Berry nor R. E. Berry is asserting any right.

The appellant raised a further point that even if in fact she[2] was not the insured within the meaning of S. 24, she became so by reason of an estoppel. But the only estoppel alleged was a matter between the respondents and Jean Berry: the respondents took up and conducted Jean Berry's defence in the claim for damages, and it was said that in doing so, they conclusively admitted she was the insured. Even, however, if

1. (1924) 2 K. B. 282.

2. (Jean Berry?).

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that were so, that would not benefit the appellant, because she was no party to any such estoppel and further S. 24 is dealing with one who is insured in fact and by an actual contract. Their Lordships do not think, however, that any such estoppel is made out even as between Jean Berry and the respondents. This point also fails.

In their Lordships' opinion the appeal should be dismissed with costs, and they will humbly so advise His Majesty.

Solicitors for appellant: *White and Leonard.*

Solicitors for respondents: *Blake and Redden.*

S. R. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD THANKERTON, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Jagannath Rao Dani .. *Appellant**

v.

Rambharosa and another .. *Respondents.*

P. C.

Jagannath Rao Dani *v.* Rambharosa.

Hindu Law (Bombay School)—Adoption—Widow's power—Construction of will executed by testator on eve of a journey—" Contingent " will —Practice—Duty of Courts in India to pronounce their opinion on all important issues in an appealable case.

Under the Bombay School of Hindu Law, a widow has in herself power to adopt, subject only to such restriction, if any, as may have been imposed upon her by her husband.

On the construction of a will which recited that it was executed by the testator on the eve of a visit to the Delhi Darbar,

Held, (repelling the contention that the will was to take effect only in the event of the testator dying during his visit to Delhi), that the will was not a " contingent " one, and remained operative even after the testator's return from Delhi.

In an appealable case, though the decision on any one issue may be sufficient for the disposal of the case, it is nevertheless the duty of the Courts in India to pronounce their opinion on all the other important points raised before them, to obviate the inconvenience and expense of a remand by the Privy Council.

Appeal No. 127 of 1931 from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces, dated the 27th March, 1929, disagreeing with the judgment and decree of the Additional District Judge of Raipur, dated the 16th March, 1927, though dismissing the appeal.

*P. C. Appeal No. 127 of 1931. 29th November, 1932.

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Jagannath Rao Dani v. Rambharosa.

The parties to the suit were governed by the Bombay School of Hindu Law, and the question for determination was, whether the adoption of the 1st respondent by Mst. Anandabai, widow of Baboo Rao Dani, was invalid, as having contravened the restrictions contained in her deceased husband's will. The material terms of the will are set out in their Lordships' judgment.

The appellate Court in India held, disagreeing with the learned Trial Judge, that the will was a "contingent" one and became inoperative on the testator's return from the Delhi Darbar, and that, therefore, his widow could, according to the Bombay School of Hindu Law, validly adopt any one she liked. Quoting a passage from the Board's judgment in *Yadao* v. *Namdeo*[1] that "a direction to operate as a prohibition against a Hindu widow adopting a boy to her husband as a son except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time, and on every occasion on which otherwise after his death his widow might validly make an adoption to him," the learned Judges held that no such explicit direction had been proved in this case, and therefore the adoption of the 1st respondent by Mst. Anandabai was in accordance with the law applicable to the parties, and was legal and valid. The plaintiff appealed to His Majesty in Council.

Dunne, K. C. and *Abdul Majid* for appellant.

De Gruyther, K. C. and *Wallach* for 1st respondent.

29th November, 1932. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The appellant and the second respondent are the reversionary heirs of Baboo Rao Dani who died on the 6th November, 1918, leaving him surviving his widow, Anandabai, and no issue. Anandabai died on the 27th November, 1924, and on the 7th April, 1926, the suit out of which this appeal arises, was instituted by the reversioners claiming his estate. The defendant to the suit, the first respondent before the Board, denied their right, alleging title in himself as the duly adopted son of Baboo Rao Dani. The factum of his adoption by Anandabai on the 25th April, 1920, is not seriously disputed. The issue between the parties is as to its validity in law. The family was found by the Trial Judge and was admitted in the Court of the Judicial Commissioner to be governed by the Bombay School of Hindu Law, under which a

1. (1921) L.R. 48 I.A. 513: I. L. R. 49 Cal. 1 at 11: 42 M. L. J. 219 (P.C.).

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widow has in herself power to adopt, subject only to such restriction, if any, as may have been imposed upon her by her husband. The appellant's contention in the present case is that Anandabai's power was so restricted by Baboo Rao Dani's will made on the 26th November, 1911, and that the adoption of the first respondent was in violation of its terms.

The provisions of the will, the due execution of which is not in dispute, so far as regarded adoption were as follows:—

"After all this is done (*i. e.*, after certain dispositions of the will have been carried out) a boy should be taken in adoption to perpetuate the name of ancestors and manage the estate. No boy has been yet taken in adoption. It is expected that (any) of my paternal uncles' sons may get a son. If he gives (the boy) my wife should take him in adoption. Seven years' time is allowed for this. After seven years Jiwaji's younger son Bhagwati should be taken in adoption.

* * * * *

"Seven years' time has been allowed for adoption, but if Vyenkat Rao Naik, Rao Bahadur Mahdik, Gajraj Singh and Sadashiv Rao Garad, think that (a boy) should forthwith be taken in adoption, there is no objection to my wife's (adopting a boy immediately) according as they may advise. However, the debts should be satisfied and property of an income of five hundred rupees should be set aside for the School Department, first, and a boy should be taken in adoption for the remaining property. If it is decided to take (a boy) in adoption, *mausa* Kolar should be reserved for my wife and for the maintenance of the adopted boy (the property) should afterwards be placed under the management of the Court of Wards or of *panches* of whom Vyenkat Rao Naik should be the *sir panch*. The boy should be very well educated. He should be sent to England if possible. If this boy does not exist, which God may forbid, any boy can be taken in adoption."

Various defences were raised by the first respondent which were embodied in the issues settled by the Trial Judge. They seem in the main to have been directed to two points, that the restrictions in the will were not binding upon the widow, or alternatively that they had been substantially complied with

Under the first head, it was contended that the will, which was executed by the testator on the eve of a journey to Delhi, was to take effect only in the event of his death before his return. He did, in fact, return in safety and lived for another seven years, and if this contention prevailed, the will, and with it the restrictions upon the widow's power of adoption, ceased to have effect automatically upon the testator's return. It was also alleged that the will was revoked* orally, and that after his

*The learned Trial Judge, on a consideration of Ss. 57 and 70 of the Indian Succession Act, 1925, accepted as sound the proposition that in the Central Provinces where the Hindu Wills Act did not apply, the will could be revoked by parol.—K. J. R.

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return the testator expressly authorised the adoption of the first respondent. All these defences, upon which a considerable body of oral evidence was adduced, were rejected by the Trial Judge.

Under the second head, the Trial Judge held it established that Anandabai had asked the mother of Bhagwati, the boy of the testator's choice, to give him in adoption, but that she had refused. Under these circumstances, he was of opinion that the adoption of the first respondent, who was Bhagwati's elder brother, was a substantial compliance with the terms of the will. In this connection, he took the vernacular words, which are rendered in the official translation as "if this boy does not exist," as equivalent to "if he is not available". He also seems to have regarded the seven years' interval which was to elapse before Bhagwati could be adopted, as to be reckoned from the date of the will.

On all these points his judgment is attacked before the Board, while the adoption is supported on the grounds which the Trial Judge rejected.

The result of the suit in the Trial Court was that the adoption of the first respondent was held to be "valid and unimpeachable," and the suit was dismissed.

The reversioners appealed to the Court of the Judicial Commissioner. The judgment of the appellate Court was delivered on the 27th March, 1929, with the result that the appeal was dismissed. The learned Judges dealt only with the question whether the will was a contingent one. On this point they disagreed with the Trial Judge, holding that the will was to take effect only in the event of the testator dying during his visit to Delhi, and became inoperative on his return. In the view which they took of the nature of the will, they thought it unnecessary to discuss the other points raised before them.

Their Lordships regard this as most unfortunate. For the reasons presently appearing they are unable to agree with the conclusion reached by the appellate Court, and they find themselves without any assistance from the learned Judges as to the facts upon which the Trial Court founded, or as to the contentions upon which the suit was there dismissed.

It has been repeatedly pointed out by this Board that it is the duty of the Courts below to pronounce their opinion on all

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the important points in an appealable case, and that a failure to do so not infrequently necessitates a remand with the consequence of heavy additional costs. The observance of this rule is, their Lordships think, of special importance where the decision of other points depends, as it well may in the present case, upon the sifting of a mass of oral evidence, or upon the proper significance of the language employed in a vernacular document.

The conclusion to which the learned Judicial Commissioners came was based directly upon the opening words of the will, which were as follows:—

> "I am going to Delhi for the Darbar, therefore, I am writing the following conditions about my property. I hope that by the grace of God such an occasion will not arise, but strange is the course of time."

They thought that by the second sentence of the quotation "the testator obviously meant that he hoped that no occasion would arise for the will to come into operation, and as he cannot have meant that he hoped to live for ever," it seemed to them "clear that he intended his will to have a limited operation, and that the reference to the visit to Delhi" showed "that the operation of the will was to be limited to the occurrence of his death during that visit." They found some corroboration of this in the detailed reference in the will to petty debts for the settlement of which directions were given, "a reference which was obviously made in contemplation of the will coming into operation almost immediately."

Their Lordships are unable to agree with this line of reasoning. The testator's contemplated journey was, no doubt, the occasion, and was probably the reason of his making the will, but there is, in their Lordships' opinion, nothing in the words used by him to indicate that the will was to cease automatically to be operative on his return. He may quite possibly have had it in his mind that the will might require revision after his return, but that would not make it "contingent": the intention in such a case would almost certainly be that it was to remain operative until a new will was made. The question is discussed with much care by the Trial Judge and their Lordships agree with his reasoning.

Before the Board support was sought for the view taken by the Judicial Commissioners from portions of the oral evidence adduced in the case. When the testator left his home he handed

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over the will in a sealed envelope to one Sadasheo Rao Garad, with whom it remained till Sadasheo's death in 1914. It then passed into the possession of Sadasheo's son Ramchandra, who was a witness in the case. He deposed that after his father's death the testator asked him for the will, but that he could not then find it, and that thereupon the testator said that it did not matter because the will was merely to hold good while he was absent at Delhi. The Trial Judge said that he did not believe this man, and the appellate Court does not even refer to his evidence. Under these circumstances, their Lordships can hardly be asked to place any reliance upon his statement.

Another witness, Thakur Gajraj Singh, said the testator had told him that he had made " a temporary will," and that he would reconsider it later and make another will. This, however, is not inconsistent with the view their Lordships have taken: it does not, they think, suggest that the will was a contingent one. This witness again is not referred to or relied on by the Judicial Commissioners.

One thing, however, is clear, *viz.*, that the testator upon his return from Delhi, took no steps to reclaim the document from Sadasheo's custody or to make another will, and that it was only upon Sadasheo's death that he made any enquiry about it. So far as the testator's intention in making the will can be deduced from his subsequent conduct, there is nothing to suggest that he thought himself to be, from the moment of his return, intestate, and so continued until he died.

For these reasons their Lordships are of opinion that the will was not a contingent one, and that if not revoked, it came into operation on the death of Baboo Rao Dani.

The other questions in the case, upon which the validity of the first respondent's adoption depends are of considerable intricacy and their Lordships think that they ought not to take upon themselves the affirmance or disaffirmance of the findings of the Trial Judge until they have been examined and pronounced upon by the appellate Court in the ordinary way. They will, therefore, humbly advise His Majesty that the decree of the Court of the Judicial Commissioner, dated the 27th March, 1929, should be set aside, and the case remanded to that Court for the decision of all other questions arising upon the judgment of the Trial Judge. The costs of this appeal must be paid

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by the first respondent. All other costs will be dealt with by the Court of the Judicial Commissioner.

Solicitors for appellant: *Francis and Harker.*

Solicitors for respondents: *T. L. Wilson & Co.*

K. J. R. *Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD MACMILLAN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Shyam Narain Singh .. *Appellant**

v.

Suraj Narain Pandey and another .. *Respondents.*

P. C.

Shyam Narain Singh *v.* Suraj Narain Pandey.

Hindu Law—Alienation by father—Son's liability—Proof of general charge of immorality, not sufficient—Definite connection between debts and acts of immorality must be shown.

Where an alienation (*e.g.*, by way of mortgage) by a Hindu father of ancestral family property for payment of his antecedent debts is challenged by his son as being tainted with immorality, the onus is upon him, the son, to establish, by evidence, that the debts in question were incurred by his father for immoral purposes. The burden of proof is not discharged by establishing a general charge of immorality, *i.e.*, it is not enough to prove that the father was a man of extravagant and licentious habits, but there must be sufficient evidence to connect the particular cases of expenditure directly with the acts of immorality alleged.[1]

Consolidated Appeal No. 8 of 1931 against a judgment and two decrees of the High Court, Allahabad, dated the 2nd May, 1929, substantially modifying a judgment and decree of the Court of the Subordinate Judge of Gorakhpore, dated the 13th April, 1926.

The question requiring determination in these appeals was one of fact, namely, whether the consideration for the suit mortgage was tainted with immorality. The High Court, disagreeing with the finding of the Trial Judge, held that the debts which the plaintiff-respondent had paid off with the consideration of the mortgage were not tainted with immorality and that the plaintiff was entitled to succeed. They accordingly passed a decree for sale in the plaintiff's favour.

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*P. C. Appeal No. 8 of 1931. 18th November, 1932.
Allahabad Appeals Nos. 46 and 47 of 1929.

1. With regard to the above head-note, it must be remembered that the burden is on the son to prove *also* that the alienee had notice, or upon reasonable enquiry might have discovered, that the debt was contracted by the father for an immoral purpose. It was not necessary for their Lordships to consider this aspect of the question, as they concurred with the finding of fact by the High Court that the debt in question was not tainted with immorality. (*See* Mulla's *Hindu Law*, 5th ed., page 301.)—K. J. R.

F. B.

Mounaguruswami Naicker, *In re.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the transfer of S. C. No. 100 of 1932 from the file of the Court of Session, Madura Division, to the file of any other Court of Session.

Nugent Grant for *B. R. Sethuraman* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court expressed the following

Beasley, C. J.

OPINION. *The Chief Justice.*—This transfer petition was directed by me to be placed before this Full Bench not because of any difficulty which arises in the petition which is not opposed but because it is a favourable opportunity for resolving difficulties with regard to procedure which have arisen on account of conflicting opinions expressed by this High Court.

One of these is *Krishna Pannadi* v. *Emperor*[1], a decision of Jackson, J., and another is *Kandregula Jaggu Naidu* v. *Emperor*[2], a decision of Reilly and Krishnan Pandalai, JJ. Some difficulty has probably been created also by *Krishtamma* v. *Emperor*[3], a decision of Waller and Cornish, JJ. These cases lay down the procedure to be adopted at the trial of cases and counter-cases, the two former by Sessions Judges and the latter by Magistrates. In *Krishna Pannadi* v. *Emperor*[1] Jackson, J., stated:

> "There is no clear law as regards the procedure in counter-cases, a defect which the Legislature ought to remedy. It is a generally recognised rule that such cases should be tried in quick succession by the same Judge who should not pronounce judgment till the hearing of both cases is finished. This precludes the danger of an accused being convicted before his whole case is before the Court, and also prevents there being conflicting judgments upon similar facts."

Jackson, J., then points out that there is obvious difficulty in the adoption of this rule as it seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found on the record. He then proceeds to state his view that the only way in which such a procedure can be justified is by setting up a fiction that the case and counter-case are really one and suggests that this fiction should be made a reality by statute. This judgment has been severely criticised in *Kandregula Jaggu Naidu* v. *Emperor*[2] but I am bound to say that I think that most of the criticism is due

1. 1929 M. W. N. 883.
2. 1932 M. W. N. 692.
3. 1929 M. W. N. 881.

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to a misunderstanding of Jackson, J.'s judgment because on p. 696 Reilly, J. says:

"I understand Jackson, J.'s opinion to have been that not only should the same Assistant Sessions Judge have heard both cases to the end and have had the evidence of both of them in his mind before he pronounced judgment in either but also that he should have tried both cases with the aid of the same assessors. . . . . That is how the learned Sessions Judge of Vizagapatam has understood Jackson, J.'s directions and it is that procedure he has followed."

I do not understand Jackson, J. to have meant that both cases should be tried with the aid of the same assessors. What he does say is that both cases should be tried in quick succession by the same Judge who should not pronounce judgment until the hearing of both cases is finished. If that is what Jackson, J., meant, then there is really no difference between the procedure Jackson, J. has in mind and that indicated by Reilly and Krishnan Pandalai, JJ. It seems to me that all the three are agreed upon the desirability of the Judge withholding judgment until he has heard both the case and the counter-case, but since Jackson, J. states that this procedure may allow the facts in the one case to impress or influence the Judge in the other case, it is as well to observe that if the Judge withholds his judgment until he has heard both cases for the purpose of considering the cases as if they were one case, then that would be an irregular procedure; and the suggestion made by Jackson, J., that a fiction should be set up that the case and the counter-case are really one and should be made a reality by statute seems to me to be one which it would be very difficult to adopt. Waller and Cornish, JJ., who were dealing with the procedure in the Magistrates' Courts are of the opinion that "no Court can grasp the real facts unless it tries both cases". If by that it is meant that the fundamental principle that the Court must not have regard in one case to the facts in another is not to be observed then that view cannot be supported. Possibly if the Judge reserves judgment in both cases in order that he may consider both for the purpose of arriving at the truth, he is likely to reach a more satisfactory result than by trying each case without reference to any of the facts in the other. But since this procedure is irregular, it cannot receive our support. No hard and fast rule can be laid down. It is sufficient to say that there can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries

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the one quite independently of the facts in the other. Should the Judge, however, feel that he is likely to be embarrassed by the adoption of this procedure, he will no doubt get a transfer of the counter-case to the file of another Sessions Judge. What must be made clear is: (1) that the trial must be separate, *i.e.*, before different assessors and separate judgments delivered; (2) that the conclusions in each case must be founded on, and only on, the evidence in each case, and (3) that if the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment.

We are much obliged to Mr. Nugent Grant and Mr. Bewes for their great assistance to us as *amici curiae*.

Stone, J.

Stone, J.—I agree.

Burn, J.

Burn, J.—I agree.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

[On a difference of opinion between Waller and Pandalai, JJ.]

The Public Prosecutor .. *Appellant* in Cr. Appeal No. 29 of 1932*

Lakshmamma and another .. *Petitioners in Cr. R. C. No. 763 of 1931 (P. W. 23 and P. W. 1)*

v.

Mitta Venkatamma and another .. *Respondents (Accused 1 and 2).*

The Public Prosecutor *v.* Venkat-amma.

Penal Code (XLV of 1860), S. 300—Murder by one of two accused—No evidence of which one—Conviction for murder—S. 201—Possibility of one of the two accused being the principal culprit, no bar to conviction of both—Statement by witness before Magistrate—No caution administered—Admissibility in prosecution against maker.

Accused 1 and 2, mother and daughter, were charged with the murder of a boy. The husband of the 2nd accused had proposed to adopt the boy and the accused had not liked the idea. At the time when the boy disappeared, the husband of the 2nd accused was away from home and the two women were alone Two days later the 1st accused was observed throwing the dead body of the boy from her roof on to the adjacent roof and the 2nd accused attempting to screen her with a cloth. The house was then searched by the Police and found to contain traces of the body having been buried in a decomposed condition. The 2nd accused was produced before a Magistrate and she made a statement as a witness attributing the murder to her mother and repudiating her own complicity in it.

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*Cr. Appeal No. 29 of 1932. 15th March, 1932.
Cr. R. C. No. 763 of 1931.
(Cr. R. P. No. 694 of 1931).

The Public Prosecutor v. Venkatamma.

Held, (by Curgenven, J., agreeing with Pandalai, J.) (*i*) that the statement was not admissible against the 1st accused and in the absence of any other evidence to show who actually committed the murder or that both had acted in concert in killing the child, neither of them could be convicted of murder; (*ii*) that the fact that one of the two was the principal offender was no bar to the conviction of both of them under S. 201 of the Penal Code.

Chinna Gangappa, In re, (1930) I. L. R. 54 Mad. 68: 59 M. L. J. 677, referred to.

Teprinessa v. *Emperor*, (1918) I. L. R. 46 Cal. 427 and *Rup Narain Kurmi* v. *King-Emperor*, (1930) I. L. R. 10 Pat. 140, followed.

Per *Waller, J.*—The evidence as to motive, opportunity and conduct being common, both the accused should be convicted of murder.

Per *Waller, J.*—A statement made before the Magistrate by a witness into which he introduces some matter that incriminates himself is not inadmissible merely because the formalities prescribed by S. 164, Criminal Procedure Code, in regard to confessions have not been carried out. Even if it amounted to a confession, S. 29 of the Evidence Act would apply to it.

Per *Pandalai, J.*—(*Obiter.*) Neither S. 164 of the Criminal Procedure Code nor S. 29 of the Evidence Act would apply to the statement. Under S. 132 of the Evidence Act, it cannot be proved in a prosecution against the maker of the statement.

Criminal Appeal No. 29 of 1932.—Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal under S. 302, Indian Penal Code, of the accused by the Sessions Judge of the Cuddapah Division in S. C. No. 16 of 1931 on his file and for enhancement of the sentences passed under S. 201, Indian Penal Code, on the accused in the said S. C. No. 16 of 1931.

Criminal Revision Case No. 763 of 1931.—Criminal Revision Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the said judgment of the Court of Session of the Cuddapah Division in S. C. No. 16 of 1931, set aside the acquittal under S. 302 or enhance the sentences passed on the accused under S. 201, Indian Penal Code.

V. L. Ethiraj and *Miss B. Ananda Bai* for petitioners.

Messrs. Nugent Grant, K. R. Krishnayya Chetty and *C. V. Nagaraja Sastri* for respondents.

The Public Prosecutor for the Crown.

The case originally came on for hearing before Waller and Pandalai, JJ., and as they differed on both the points, *viz.*, acquittal under S. 302 and conviction under S. 201 of the Penal Code, it was referred to a third Judge, Curgenven, J.

Waller, J.

Waller, J.—The respondents in this Criminal Revision Case and Appeal were charged with the murder of a little boy named Ramudu. They were charged also with an offence under S. 201, Indian Penal Code. Three of the assessors found them not guilty

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Waller, J.

on both charges. The fourth thought that the 1st respondent was guilty of murder and the 2nd of abetment and that both had committed the offence under S. 201, Indian Penal Code. The Sessions Judge was of opinion that the boy had been murdered and that one or other of the respondents had murdered him. As he was unable to decide which had murdered him, he acquitted both of murder, but convicted them under S. 201, Indian Penal Code. On the 1st respondent he passed what was, under the circumstances, the surprisingly lenient sentence of 4 years' rigorous imprisonment. That passed on the 2nd was still more surprising—imprisonment till the rising of the Court—although there was really no ground for distinguishing between the two. The parents of the boy not unnaturally, filed a revision petition asking that the acquittals on the charge of murder should be set aside or that, at the least, the sentences should be enhanced. The Public Prosecutor subsequently preferred an appeal with the same objects in view.

The facts are, on the whole, simple and clear enough. The murdered boy was the son of P. Ws. 1 and 23, who lived next door to Kondiah, the husband of the 2nd and son-in-law of the 1st respondent. Kondiah was an elderly man and his wife middle-aged and they had had only one child, a daughter now aged about 18. He had, it is said, taken a great fancy to Ramudu and was proposing to adopt him, a proposal to which his wife and her mother objected. On 2nd and 3rd. April he was away from home, leaving the respondents alone in the house. On the evening of 2nd, Ramudu disappeared. A search was made for him, but without success and his father offered a reward of Rs. 50 to any one who could find him. This led to no result and he gave information to the Police the next day. In the meantime, something curious had happened. He had sent P. W. 19 to consult a certain astrologer and P. W. 19 had come back with the information that the "women of the northern house (in which the respondents lived)" had killed the boy and that his body would be found on Saturday, the 4th. On that day Kondiah returned and, according to a statement made by the 2nd respondent to P. W. 20, noticed an unpleasant smell in the house and was told that it must be due to a dead bandicoot. The next day (5th) he had a meal and went out. The women must by then have been desperate; the body of the boy was certain to be found if they kept it any longer in the house and so they were driven to desperate measures. It is not easy to dispose of a corpse even in a village; in the heart of a town like Proddatur it is a matter of extreme difficulty. What they did was to take the boy's body from the place where it had been concealed, to carry it up the stairs to the roof and thence to throw it on to the adjacent roof of P. W. 1's house. By a strange

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and, for them, most unfortunate, coincidence, they happened to be observed by P. W. 2, who saw the boy's body being thrown out of a basket by the 1st respondent, the 2nd respondent attempting, at the time, to screen her with a cloth. Possibly he did not see quite as much as he says he did, but he had doubtless heard of the astrologer's prophecy and put two and two together; for he at once ran to P. W. 1's house shouting, in order to give information. His cry had attracted the attention of P. W. 3, who looked up to the roof and saw the respondents there. On reaching P. W. 1's house, P. W. 2 gave information to P. W. 22, who passed it on to P. W. 1. The latter sent his peon (P. W. 8) to the Police to give information and the information he gave was recorded in Ex. III. Much, naturally, is made of the fact that the respondents are not mentioned by name in Ex. III, but I do not think that the omission is very significant. P. W. 8 was not himself an eye-witness and it is not unlikely that, in his agitated state of mind, P. W. 1 forgot or did not think it necessary to name the respondents to him. The Head Constable, who recorded Ex. III, went to the house at once and there was told their names. On the roof he found the dead body of the boy in an advanced state of decomposition. Mr. Grant suggests that it must have been thrown on the roof after the murder and decomposed there. If that had been done, discovery must have been made much sooner, as the body would have attracted the birds of the air in a very short time. I infer then, that it must have been thrown where it was found very shortly before it was found. Some time later, the Inspector (P. W. 11) came and examined Kondiah's house. In the kitchen he found a trough full of sand where waterpots were usually kept from which the very offensive smell came. In the sand, there was a hole, in which the boy's body had evidently been buried. In another room he saw a basket which also smelt most offensive and in the bath-room he found a woman's cloth, from which emanated the same odour. He followed the smell up the staircase and saw drops of serous fluid on the stairs. From his evidence it seems quite clear that the boy's body had been buried for some time in the trough and that it had recently been removed from it and taken to the roof. No suspicion of any sort attaches to Kondiah and the only people who could have buried the body and removed it to the roof were the women of the house. This must have been done by them shortly before the discovery and there is, therefore, material corroboration of P. W. 11's story.

After the discovery a crowd of men collected, among whom was K. Subbayya Chetty (P. W. 20), who seems to be a prominent and influential resident of Proddatur. In his presence Kondiah

asked his wife to tell the truth and she made a long statement, the effect of which was to place the entire blame on her mother and to exculpate herself completely. Her mother it was who did everything—killed the boy, buried his body and carried it up to the roof. The Sessions Judge declined to allow the statement to be put in evidence, as he thought that P. W. 20 was a person in authority, which he was not, that the statement was a confession, which, as regards the charge of murder, it was not and that it had been made as the result of some sort of inducement, whether by way of threat or promise does not appear, which it does not seem to have been. Afterwards, the 2nd respondent was sent by the Police to the Magistrate to be examined under S. 164, Criminal Procedure Code, and she was so examined and told then much the same story as she had told to P. W. 20. The Sessions Judge describes this as a peculiar episode. I can myself see nothing peculiar about it. The Police were then investigating a charge of murder and not a charge under S. 201, Indian Penal Code. They were aware that the 2nd respondent was attributing the murder to her mother and desired to have her evidence as a witness recorded. She was examined, therefore, as a witness and not as an accused person, who was expected to make a confession. The Sessions Judge excluded her statement from evidence on the ground that it was inadmissible because the Magistrate had not gone through the formalities required by S. 164, Criminal Procedure Code, in respect of the recording of confessions.

Now what did these two excluded statements amount to? What the 2nd respondent, P. W. 20, the Police and the Magistrate were thinking about at the time was the murder and nothing else. An offence under S. 201, Indian Penal Code, was in the contemplation of no one. That being so, it was the 2nd respondent's objectnot to confess to anything, but to repudiate the murder and to fasten it on some one else, which she proceeded to do—so that, on the whole, neither of these statements was or was intended to be a confession, properly so described. It is true, of course, that her legal duty was, under S. 44, Criminal Procedure Code, to give information of the murder and that her omission to do so was an offence under S. 202, Indian Penal Code. Further, her illegal omission might be construed as intended to aid her mother's offence under S. 201, Indian Penal Code, within the meaning of S. 107, Indian Penal Code. But all this was, at the moment, rather beside the point. She was not aware that she was admitting anything criminal nor did she intend to do so. I interpret her statement to P. W. 20 as a denial of complicity in the murder rather than as a confession of guilt under Ss. 201 and 202, Indian Penal Code. Even if it be construed as

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a confession, I do not agree that it should have been rejected as evidence against her; for P.W. 20 was not a person in authority and there is no satisfactory evidence of improper pressure. As regards the statement made to the Magistrate, it must be remembered that she was then thought and thought herself to be a witness. And it is, at the least, a very arguable question whether a statement made by a witness, into which he introduces some matter that incriminates himself, must be excluded from evidence merely because the formalities prescribed by S. 164, Criminal Procedure Code, in regard to confessions have not been carried out. After all, it would be expecting something superhuman of a Magistrate to require him to warn a person not to say something which no one had any reason to suppose he was going to say. Apart from that, the Sessions Judge has overlooked S. 29 of the Evidence Act, which says that no confession, which is otherwise admissible, becomes inadmissible merely because the maker of it has not been warned that he need not make it and that it might be used against him. On the whole, I think that both of the statements, even if they were confessions, were not inadmissible in evidence as against the 2nd respondent. The proper way, however, of dealing with them is, in my opinion, to treat them as worthless, as being no more than efforts by an accomplice to shift the whole guilt on to another person. And that is the way in which I propose to treat them; in fact, to ignore them altogether.

What then remains? There is, first of all, the motive, which has been proved and affects both of the respondents equally. There is next the fact that, when P. W. 1 questioned them about the missing boy, they replied that he had not been to the house; and that was at a time when he was dead and both of them must have known that he was dead. There are further the facts that they were alone in the house at the time when the boy was buried and must have been killed in the house, that the body could be tracked up the stairs and that it had evidently been carried up there in the basket found by the Inspector in the house. Finally, there is the evidence of P. W. 11, which I see no reason to disbelieve, that one of them threw the body on to P. W. 1's roof, while the other tried to screen her and also that of P. W. 3 who saw them both on the roof after he heard P. W. 11's cry. As against the 1st respondent, in addition, it has been proved that she pointed out to the Police the place where the dead boy's shirt was found.

What inference can be drawn from these facts? The first is that the boy was murdered. On the question of who murdered him, the Sessions Judge thought that it must be one or other of the respondents but, as he could not decide between them, he acquitted them both. I do not think myself that that was the right conclusion. The proper inference seems to me to be that they must have been

acting in concert throughout. They were alone together in the house. Both shared in the motive and I cannot believe that either would have run the risk of killing the boy and hiding his body in the kitchen without the knowledge and connivance of the other. Both of them lied to P. W. 1 when he asked about the boy. Both of them kept silence for two days and then, when the position became desperate, acted together in disposing of the body. Probably only one of them actually committed the murder—it does not matter which of them it was—but I do not doubt that the other connived at it. I would therefore set aside the acquittals, convict both of murder and sentence them each to transportation for life. As regards the offence under S. 201, Indian Penal Code, it having been found that both of them were privy to the murder, it is not necessary to fall back on that section, which applies to persons other than the principal offenders. The view of the Judge that, though he could not decide which of the respondents committed the murder, they could both be found guilty under S. 201, Indian Penal Code, is, to my mind, quite illogical. If he could not decide which was the offender, how could he find which concealed the body in order to screen the offender?

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Krishnan Pandalai, J.—I shall deal with the Criminal Appeal first. The facts are fully stated in the judgment of the Lower Court and that of my learned brother which I have had the advantage of reading. The question in the appeal is whether there is sufficient evidence on which either or both of the respondents can be convicted of murder. After giving the matter my earnest consideration I much regret that I am unable to agree with my learned brother that the acquittal of the respondents on the charge of murder was wrong. I agree with the Lower Court and my learned brother that the evidence leaves no room for doubt that the boy Ramudu was murdered in the house where the respondents and Chinna Kondayya, the husband of the 2nd respondent, live some time after he was missed on the afternoon of the 2nd April, 1931. I agree also that there is no room to suspect the complicity of Chinna Kondayya in this crime as he appears to have been absent from the house on the 2nd and returned only on the 4th. The child would appear (there is really no evidence about it except the statement of the 2nd respondent which will be referred to later) to have been drowned in a water trough and his body buried in a sand trough. On the 4th Chinna Kondayya returned and complained of offensive smell in the house. He was told that it might be a dead bandicoot. The next day he went out after his morning meal and before he came back the two respondents are proved to have carried the dead body of Ramudu, which was the cause of the smell and which was in a highly decomposed condition, upstairs in a basket and to have

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thrown it on the neighbouring terrace of P. W. 1, the 1st respondent carrying the basket and the 2nd respondent screening it with a cloth. The Police came. Chinna Kondayya also came back and the 2nd respondent being taxed with the murder by her husband and the people who gathered made a statement to P. W. 20 exculpating herself from all responsibility for the murder and accusing the 1st respondent. The Police apparently accepted this version and placed her before the Magistrate where she substantially repeated as a witness under S. 164 what she had told P. W. 20. On the 6th, on information given by the 1st respondent, a shirt, which was on the body of Ramudu, was recovered from a heap of groundnuts.

Before considering whether the charge of murder can be brought home upon the above facts to either or both the respondents, I shall refer to the two statements of the 2nd respondent abovementioned which have been excluded from consideration by the learned Sessions Judge. As to the statement made to P. W. 20, Mr. Grant has admitted that the rejection was wrong. I agree with that view. The ground on which it was rejected is that it was made to a person in authority in circumstances making it inadmissible under S. 24 of the Evidence Act. I cannot agree with the Lower Court either that P. W. 20 was a person in authority in the sense in which it is used in S. 24, or that the statement to him was caused by any inducement, threat or promise. It may be added that the statement spoken to by P. W. 20 contained no confession implicating the maker in the murder which was the subject of P. W. 20's question, that all that it contains is a narration of facts from which it may be inferred that after the murder the 2nd respondent was privy to the concealment of the body in the sand trough by her mother. It is not necessary to elaborate this point because the exclusion of this statement by the learned Judge was admittedly wrong.

The next statement whose admissibility is in question is the statement made on oath by the 2nd respondent on the 5th April before the Magistrate under S. 164, Criminal Procedure Code. The Public Prosecutor did not press that this document should be used in evidence, and therefore it is not necessary to consider the matter at length. The learned Judge excluded it on the ground that it is a confession and that it is inadmissible because the safeguards provided by S. 164 for the recording of confessions have not been complied with. At the time when it was made, it was not made by a person accused of any offence but by one who was put forward as a witness and who purported to speak as a witness about a crime committed by another person. It is substantially the same though a fuller statement than that spoken to by P. W. 20. It contains no

admission of guilt by the speaker on the charge then under investigation, namely, murder, but it contains a narration of facts from which it is possible to infer that the speaker was privy to the offence of causing disappearance of evidence of murder. It is obvious that even if it is treated as a confession as to disappearance of evidence, it is of no value as against the 1st respondent on the charge of murder. The only question is whether it can be received as evidence against the 2nd respondent herself on the charge under S. 201. I do not wish to express any decided opinion on this because the statement made to P. W. 20, which is substantially the same, is admissible. But I may point out that the question is really not governed by the rules relating to recording of confessions and their safeguards provided either in S. 164, Criminal Procedure Code, or S. 29 of the Evidence Act. Both those sections deal with persons who are accused at the time of making the statement and not with persons who are regarded as witnesses. In the case of persons accused of an offence, the Magistrate before recording that confession has to observe the safeguards mentioned in S. 164. S. 29 of the Evidence Act also deals with such persons. The present question, however, is whether inference of guilt which may be drawn from statements made by a person when he is examined as a witness may be used against him when he is tried as an offender. The only provision relating to this of which I am aware is the proviso to S. 132 of the Evidence Act which says that no answer which a witness is compelled to give shall be proved against him in any criminal proceeding except a prosecution for perjury. I do not see why this should not apply to examination of witnesses under S. 164, Criminal Procedure Code; but I do not wish to pursue this matter as the Public Prosecutor did not press for the admission of this statement and the question was not fully argued in view of the fact that the statement made to P. W. 20 was held to be admissible. I therefore have put this statement under S. 164 out of consideration.

The question is whether on the remaining evidence a conviction for murder can be sustained against either or both of the respondents. It is undoubtedly a case of suspicion of a very strong character against both the respondents; but to sustain a conviction suspicion will not do. For, where there is nothing to show which of several persons is guilty of a crime and there is nothing to show that they all participated in it, the only judicial conclusion possible is to acquit them all. This question is discussed by the learned Judge at the end of para. 25 of his judgment. He says:

"Though it is proved that either the 1st accused or the 2nd accused must have killed the boy I cannot say that both operated in the murder, the only element of doubt being who killed and who aided. As it is not possible

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to say for certain that both operated and we have to see which did the act, I have to say that though either must have done so, the quantum of proof is not such as to justify me in saying which of them did so."

As far as I know, this is good law and good sense. Mr. Grant referred to a passage from Stephen's Introduction to the Evidence Act which lays down the same thing: Woodroffe and Ameer Ali, 9th Edition, page 30. In the Evidence Act the matter is dealt with in the definition of the word 'proved'. A fact is said to be proved when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act on the supposition that it exists.

From the facts it is clear that it was possible for either of the respondents without the assistance of the other to kill the child. Keeping its head under water for a minute would suffocate it. There is nothing as far as I can see in the evidence to support the conclusion that both the respondents acted in concert in killing the child or had decided to put an and to the child before it was killed. All that we know is that both of them disliked the proposed adoption of the boy by Chinna Kondayya. But it is one thing to disapprove of a proposed adoption and quite another thing to murder the proposed adoptee on that account. The subsequent conduct of the appellants in disposing of the body is fully explicable on the ground that they are mother and daughter and that, if either of them had committed the murder, the other would readily help her to keep the murder a secret and escape detection. It would, in my opinion, therefore, be wrong from the respondents' disapprobation of the adoption and their acting together in disposing of the body to infer that they had acted in concert in killing the child. The 1st respondent is aged 60 and the second 40. The 2nd respondent's accusation of her mother certainly cannot be considered as against the mother; and reading the evidence as a whole I cannot escape the feeling that "The lady doth protest too much methinks". If against her mother her statement is inadmissible, against herself it is worthless except to the extent already mentioned. In the absence of anything but suspicion on which I can found the conclusion that both the respondents acted in concert to kill the child, I cannot find that the act of one of them can be fastened on the other and, as there is nothing to show which of the two respondents killed the child, the only conclusion to which I can come is that neither of the respondents can be held guilty of murder. Horrified as I am at the brutal and devilish cruelty of one of these women, I would dismiss the appeal.

Coming to the Revision Petition, in the view taken by my learned brother on the question of the appeal, it was not necessary for him

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to deal with the Revision Petition which seeks to enhance the sentence passed by the Lower Court under S. 201. Certainly on the finding arrived at by the learned Judge in para. 27 of his judgment, the sentence passed by him on the 2nd respondent was farcically lenient. He awarded four years to the 1st respondent and simple imprisonment till the rising of the Court to the 2nd. If he had passed the same sentence on the 2nd respondent as he did on the 1st, probably nothing more would have been heard of this case. His ground for this lenient sentence is that nothing is alleged or proved against the 2nd respondent except that she held a green cloth as a screen when the 1st accused began her march on the terrace to hide the trace of the crime of murder. This is not correct. Mr. Grant, as he was entitled to do on a notice to enhance the sentence, argued that the 2nd respondent was not guilty at all and he urged that she had taken no part in any act which is necessary to constitute the offence and that she had not caused any evidence of the crime to disappear with the intention of screening an offender from punishment. As regards this, it is sufficient to refer to her statement to P. W. 20, in which she said:

"I asked my mother what is in the water trough. My mother told me that she threw Ramudu into it. Do not cry out. She said that she did so and that I should not expose her as she was my mother. She said that she would set right the matter and come; and asked me to be outside and take part in the search for the boy by his people. They were searching for Ramudu outside. I also was searching saying 'Where is Ramudu?' Then I went into my house again. I saw the body of Ramudu placed near the water trough on the slab floor by my mother. My mother asked me to go outside because if both were inside they would be suspected, and to be crying along with others. She said that she would set right everything. A little later I went in. I saw the body kept near the said trough. My mother dug a pit in the sand trough. My mother asked me to go out saying that she would follow me. I was outside. My mother then came out a little later and told me that she set right everything."

It is clear from this statement of the 2nd respondent herself that she was present when the body was buried in the sand trough and that both immediately before and after, she was acting in concert with and helping her mother in secreting the body by playing her part outside the house, pretending to be looking for the boy and crying as if she was sorry for his disappearance. On the evidence there is no doubt that both the respondents took part in burying the body and so causing disappearance of evidence of the offence and there can be no doubt of the intention to screen the offender from punishment. But it is suggested that it is illogical to punish both the respondents under S. 201 because one of them must have been the murderer and it is not legal to punish the person guilty of murder of the offence of causing disappearance of evidence of the offence and hence it is suggested that, as it is not possible to say which of the two respondents was guilty of the

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murder, it is not possible to say which of them is punishable for causing disappearance of evidence. The fallacy underlying this reasoning is that it ignores that, when it is held that neither of the respondents can be convicted of the principal offence of murder, it follows that neither of them is legally guilty of the principal offence. Therefore, when the respondents are held guilty under S. 201 neither of them is a person guilty of the offence of murder.

I, therefore, think that both the respondents were properly convicted under S. 201. As for the sentences, having regard to the 1st respondent's age, it seems hardly necessary to enhance her sentence beyond the four years already awarded; but, as regards the 2nd respondent, I would enhance her sentence to seven years' rigorous imprisonment.

Waller, J.

Waller, J.—I have now had the advantage of reading my learned brother's judgment, but regret to say that I remain of the opinion that the line of reasoning, which led to the acquittal of the respondents on the charge of murder, must lead to their acquittal on the charge under S. 201, Indian Penal Code, also. If they can both be convicted on the later charge, as a result of their acquittal on the former, it seems to follow that they were screening some third party, who was the real murderer. That, however, is no one's finding. The finding is that one or other of them committed the murder, but that both must be acquitted, because it is impossible to decide which of them actually committed it. On those assumptions, I do not see how the finding in regard to the charge under S. 201, Indian Penal Code, can be different. It must, in my opinion, be that one or other of the women committed that offence, but, it being impossible to say which of them did so, both must be acquitted.

As regards the charge of murder, the assumption which seems to me unjustifiable, underlying the Sessions Judge's conclusion is that only one of the women could have committed the murder. That may be, to a certain extent, that is to say, literally correct; for it does not take two women to kill a child of three, but why should it be assumed that the other could not have been privy to it? One may be guilty of a murder without physical participation in it. Let me put the case in this way. Suppose that the 1st respondent had been the only accused in the case and that the 2nd had been away from home on three critical days. Leave all the circumstantial evidence as to motive, opportunity and conduct as it is. Would the Sessions Judge have hesitated to convict the 1st respondent of murder? I imagine not. And similarly, if the 2nd respondent had been the only accused. What makes the difference, where both are charged together on exactly the same evidence of motive, opportunity and conduct, which is equally applicable to both? I shall be

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told that, in the cases stated, there can be no difficulty, as only one of the women could have committed the murder. That is quite correct, but why carry that assumption into our present case, where both of the women are charged and the evidence against both is equally strong? When only one person is charged and she is the only person that could have committed the crime one assumes without difficulty that she committed it. When two are charged with the crime and they are the only persons that could have committed it, I can see no reason why the assumption should be not that both committed it, but that only one did so. The case, quoted by Mr. Grant, which is stated in Stephen's Introduction to the Evidence Act, seems to me to be beside the point. It begins:

> "Let the question be whether *A* did a certain act; the circumstances are such that the act must have been done by somebody, but it can only have been done by *A* or *B*. If *A* and *B* are equally likely to have done the act, the matter cannot be carried any further."

That may be perfectly correct, when only *A* is being charged with and tried for the act, but what if *B* is being tried jointly with him on the evidence of circumstances, which incriminate both equally? In that case, there seems no reason why the Court should seek to differentiate between them or assume that the act could have been done by only one of them.

I would, as I have already said, convict both of the respondents of murder and acquit them on the other charge. If, on the other hand, their acquittal of murder is right on the ground stated, they should, in my opinion, be acquitted on the other charge on the same ground. As my learned brother disagrees with me on both points, the case will have to go before a third Judge.

Mr. Ethiraj has now drawn my attention to the decision in *Chinna Gangappa*, In re[1] which lays down that there is nothing in the language of S. 201, Indian Penal Code, that prevents the principal offender being convicted under that section. With great respect it seems to me that the illustration to the section indicates very clearly that it applies only to persons other than the principal offenders.

[And this Appeal and the Criminal Revision Petition coming on for hearing under S. 429 of the Code of Criminal Procedure, 1898, the Court (Curgenven, J.) delivered the following]

Curgenven, J.

JUDGMENT.—This case comes before me owing to a difference of opinion between Waller and Pandalai, JJ. The facts have been stated fully in the judgment of the learned Sessions Judge and briefly but sufficiently in that of Waller, J. On Thursday, the 2nd April, 1931, a male child aged 3 entered

1. (1930) I. L. R. 54 Mad. 68: 59 M. L. J. 677.

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or was decoyed into the house of which the two respondents, who are mother and daughter, are inmates, and there murdered. The motive for the crime was undoubtedly a wish of the husband of the 2nd respondent, Kondayya, to adopt the boy, which for easily understood reasons would be objectionable to the two women. They were tried on charges both of murder and of causing the disappearance of evidence with the intention of screening the offender from legal punishment under Ss. 302 and 201, Indian Penal Code. As regards the former charge, the learned Sessions Judge found that the child must have been killed either by both the women together or by one of the two; but he was of opinion that the evidence did not exclude the possibility that one might have committed the murder without the assistance of the other, so that in his view it was not possible to convict either of that offence. He convicted them both under S. 201, Indian Penal Code, and sentenced the 1st respondent to four years' rigorous imprisonment, imposing upon the 2nd respondent the nominal sentence of simple imprisonment until the rising of the Court. The Public Prosecutor has appealed against the order of acquittal under S. 302, Indian Penal Code, and for enhancement of the sentences passed under S. 201, Indian Penal Code. There is also a Criminal Revision Petition presented by the parents of the child, praying for similar modifications in the orders passed.

When the case came before the Criminal Bench of this Court, Waller, J., after summarising the facts drew the inference from them that both the respondents must have been acting in concert throughout. He relied upon the considerations that both shared in the motive and were alone together in the house and he was unable to believe that either would have run the risk of killing the boy and hiding his body without the knowledge and connivance of the other. It had also been proved that both of them had subsequently made false statements when asked if they had seen the child and had acted together in disposing of the body. The learned Judge concludes with the observation,

"Probably only one of them actually committed the murder—it does not matter which of them it was—but I do not doubt that the other connived at it."

The view taken by Pandalai, J., agreed with that of the Sessions Judge, that the evidence was insufficient to show in the case of either of the respondents that she actually participated in the crime. It was clear from the facts, as indeed was conceded

by Waller, J., that it was possible for either of the respondents to kill the child without the assistance of the other, and although both may have had a motive to do away with it, that circumstance did not show that both had in fact participated in the act. The subsequent conduct of the respondents in disposing of the body was in Pandalai, J.'s view fully explicable on the ground that they are mother and daughter and that if either of them had committed the murder the other would readily help her to keep it a secret to escape detection.

Unless we are to gather the facts from a statement made by the 2nd respondent, there is nothing beyond circumstantial evidence to show in what manner the death of the child was caused. The 2nd respondent's statement certainly cannot be used against the 1st respondent and I think that Waller, J., has adopted the best course in ignoring it altogether. The evidence shows that the child was last seen in the street outside the house at about 6 P.M. on the Thursday. There is nothing to show how it was induced to enter the house. We can only presume that the murder was committed that evening from the state of decomposition in which the body was subsequently found and from the improbability that the child would be kept alive in the house for any length of time. Even apart from the 2nd respondent's statement there seems good ground to suppose that it was drowned and that it was subsequently buried for the time being in a trough of sand used as a stand for pots in the kitchen. From there it was taken, almost certainly on the Sunday morning, carried upstairs on to the terraced roof of the house and thrown on to the adjoining roof, which belongs to the house occupied by the child's parents. I shall have to refer later more specifically to the evidence relating to the disposal of the body and it is sufficient to say here that both the respondents are shown by the evidence to have taken part in the operation. So far as the charge of murder is concerned these are in substance the facts upon which a decision has to be based. There is no proof direct or circumstantial to connect either of the women in particular with the physical act of murder, and in fact the prosecution has not even shown that they were both in the house at the time when it was committed. The case is admittedly not one giving rise to any presumption that two persons must have joined in the act itself, and in fact Waller, J., has conceded that probably only one of them committed it. That being so, I

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am unable to say that the evidence is sufficient to establish that both the women took such part in causing the death as would justify the conviction of each of them of the offence of murder, and it need scarcely be said that no other offence can be in question. The facts proved appear to me compatible with the theory that either may have killed the child without the assistance of the other and I think that the subsequent conduct of both the women is explicable otherwise than on the supposition that they both did take part. I agree accordingly with Pandalai, J., that so far as they relate to the acquittal on the charge of murder the appeal and the Criminal Revision Petition must be dismissed.

The learned Judges have also differed upon the sustainability of a conviction under S. 201, Indian Penal Code, although they are agreed in accepting the evidence upon which the charge is supported. It is of course open to the respondents upon this reference to show that that evidence should not be believed. It is adduced to prove that on the Sunday the two women joined in removing the body from the sand-bath in which it was concealed and in taking it in a basket on to the roof whence it was disposed of as described above. That it was so taken there is indisputable circumstantial evidence to show, and it can hardly be disputed too that the act must have been committed not long before the discovery of the body at about noon on Sunday. The complicity of both the women is sought to be proved by the evidence of three witnesses, P. Ws. 2, 3 and 12. The first of these witnesses, P. W. 2, deposed that he was easing himself near a dust-bin at the point marked *D* in the plan when he saw both the women upon the terrace of their house, the 1st respondent carrying a basket from which the feet of a child protruded and the 2nd respondent holding in front of it as a screen a green cloth. The 1st respondent threw the body out of the basket on to the terrace of P. W. 1, the child's father. It was common knowledge that the child had disappeared the evening before the witness cried out that they were throwing out the body. He then went to P. W. 1's house and gave the information, not to P. W. 1 himself who was inside, but to one Abbayi, P. W. 22. There is some conflict as to whether P. W. 1 himself heard what was said, but I do not think it is of any consequence, as he was told immediately by Abbayi and receipt of the news was followed by discovery of the body on the terrace

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above. Nor do I think that the evidence of this witness is to be disbelieved because the Police did not record a statement from him until 5 P.M. that day. He himself says that he stated the facts to the inquest panchayatdars, which is very probably true, and it appears that the Circle Inspector, who really investigated the case, did not arrive until 5 P.M. The evidence of P. W. 3 is to the effect that he was writing upon his terrace when he heard P. W. 2's cry and looking up saw both the respondents upon their roof, the 1st respondent with a basket in her hands followed by the 2nd respondent. He went upon P. W. 1's terrace and saw the body of the child there. He was not examined by the Police until the following day as he says he went to his field but no other ground has been adduced why he should not be believed. The third witness, P. W. 12, Khader Mohidin Sahib, is a Bench Magistrate, and since there is no reason for distrusting his evidence it must be taken as strongly corroborative of that of P. W. 2, since he states that he heard the latter cry out "They have thrown the body" and went to the place where the body lay. The evidence of these three witnesses has been accepted both by the learned Sessions Judge and by the two learned Judges of this Court and I can find no reason to differ from the view that it is true. It effectually establishes that both the respondents took part in disposing of the body.

There then remains the point as to which Waller and Pandalai, JJ., are in disagreement, whether the respondents should have been convicted under S. 201, Indian Penal Code, of causing the disappearance of evidence of the offence with the intention of screening the offender from legal punishment, it being clear that one or other of them, if not both, committed the murder. Upon this point there are undoubtedly differences of judicial opinion. There is in the first place a difference of opinion upon the question whether, where a person has himself committed the offence, he can be convicted of causing the evidence of it to disappear. That the section would not include the special case of the offender himself was held in an early case of the Bombay High Court, *Reg* v. *Kashinath Dinkar*[1]. The course of judicial opinion upon this question has received consideration in a very recent case of this Court, decided by

1. (1871) 8 Bom. H. C. R. (Cr.) 126.

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Wallace and Jackson, JJ., *Chinna Gangappa*, In re[1], and these learned Judges have given their reasons for holding that Ss. 201 to 203, Indian Penal Code, are applicable to a person who is guilty of the main offence, though they add that in practice Courts will not convict an accused both of the main offence and under these sections. The grounds of that decision have been criticised before me, but I consider that, sitting as a single Judge, I am bound by it. I do not for my part however find it necessary to carry the argument quite so far as to include a person who is guilty,—that is to say, who has been judicially proved guilty,—of the main offence. Cases in which such proof has been or could be given rarely or never give occasion for the application of Ss. 201 to 203, Indian Penal Code, the sort of cases in which necessity for the application of the sections arises is where the evidence falls short of proof though it may have created a more or less strong suspicion, and the accused has been acquitted. Special instances, but I think special instances only, of this class are those (like the present) where it is clear that the primary offence must have been committed by one or more of a relatively small number of persons whom, or some of whom, it is sought to prosecute under one or other of these sections. Although it may be true that the conviction of all such persons of the secondary offence must involve the conviction of at least one who has committed the primary offence, I do not think that that circumstance affords a good judicial ground for refusing to convict. We have to consider the case of each accused separately and if, say, he has been acquitted of murder, the prosecution is entitled to ask the Court to presume that he is not guilty of that offence; and if he wishes to escape conviction under S. 201 it lies upon him to rebut that presumption by showing (which of course he will not usually do) that he was a principal and not a mere accessory. The Court is not bound to refrain from convicting unless and until it is satisfied that the accused is innocent of the main offence. I do not think that mere suspicion, however strong, can form the basis of a rule of law, and if suspicion is to form the test where is the line to be drawn? If the rule is to apply to each of two persons, is it to apply to each of twenty, to each of a hundred, to all the occupants of a village? It is easy to imagine cases which would reduce the principle to an absurdity.

1. (1930) I. L. R. 54 Mad. 68: 59 M. L. J. 677.

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The case which has been cited as authority against accepting this line of reasoning is *Torap Ali* v. *Queen-Empress*[1]. There too the evidence for the prosecution pointed conclusively to one or other of two persons as being the actual murderer, but it was impossible upon the evidence to show which of them had caused the death. They were accordingly acquitted on the charge of murder and originally convicted under S. 201, Indian Penal Code. This conviction was set aside on the ground that the section referred to persons other than the actual criminals, who, by their causing the evidence to disappear, assist the principals to escape the consequences of their offence. A perusal of the judgment in this case shows that it is based purely upon the application of this principle, relying upon some earlier cases, of which *Reg* v. *Kashinath Dinkar*[2] already referred to is one. The further question is not considered, whether where each or all of the accused have been acquitted, there is room for the application of the principle. It has been pointed out to me that the report shows that the Deputy Legal Remembrancer did not argue the case on behalf of the Crown, though I do not think that it would now be said that the case for a different view was in fact unanswerable. It deserves notice that the question whether the offence of which evidence had been caused to disappear was committed by the accused themselves, was definitely answered in the affirmative in *Reg* v. *Kashinath Dinkar*[2] and that that decision went purely upon the footing that the section would not apply to the actual criminals. The same is true of the other authorities upon which the learned Judges rely, and since, therefore, the question as to the judicial effect of an acquittal of all the accused on the main charge was not even considered in *Torap Ali* v. *Queen-Empress*[1], I do not think that it really affords much if any authority upon this point. Cases directly in point are *Teprinessa* v. *Emperor*[3] and *Rup Narain Kurmi* v. *Emperor*[4]. These decisions have held that where it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction under S. 201, merely because he has been charged also with the principal offence, or because there are grounds for suspicion that he might be the principal culprit. I may refer to the judgment of Fazl Ali, J., in the last cited case for a full discussion of the

1. (1895) I. L. R. 22 Cal. 638. 2. (1871) 8 Bom. H. C. R. (Cr.) 126.
3. (1918) I. L. R. 46 Cal. 427. 4. (1930) I. L. R. 10 Pat. 140.

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question. I respectfully agree with the views expressed by the learned Judge, which are also the conclusions of Pandalai, J., in the present case. Nor do I think that it can be contended that principle loses its application where a single trial embraces charges both under S. 302 and S. 201, Indian Penal Code. An instance of such a case is afforded by the Privy Council judgment in *Begu* v. *Emperor*[1] where their Lordships held that even without a further charge the conviction of persons acquitted under S. 302 of an offence under S. 201 was warranted by S. 237 of the Code of Criminal Procedure. I conclude accordingly that there was no legal impediment to the conviction of the respondents under S. 201.

As regards the 1st respondent, I do not find sufficient reason to enhance the sentence of four years' rigorous imprisonment passed upon her. The sentence passed upon the 2nd respondent is utterly inadequate. There do not appear grounds for distinguishing in this respect between the two cases. I enhance the sentence passed on her to one of rigorous imprisonment for four years. To this extent the appeal and revision petition are allowed, and otherwise dismissed.

S. R. *Appeal and petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

The Secretary of State for India in Council through the Collector of Malabar .. *Appellant** (*1st Defendant*)

v.

Kuttipreth Kovilakath Kadathanad Porlathiri Kunhi Krishna Varma Valia Raja Avergal and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

The Secretary of State for India in Council v. Kunhi Krishna Varma Valia Raja.

Limitation Act (IX of 1908), Art. 80—Promissory note payable at specified place—Suit on war bond—Limitation—Starting point—Indian Securities Act (X of 1920), Ss. 17 and 18—Effect—Suit barred under Limitation Act—Extension of time limit—Negotiable Instruments Act (XXVI of 1881), Ss. 66, 69 and 74.

Where the claim was for recovery of the amount due on a war bond, which in form was a promissory note payable at a specified period after date thereof and at a specified place,

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*Appeal No. 248 of 1930. 31st March, 1932.

1. (1925) L. R. 52 I. A. 191: I. L. R. 6 Lah. 226: 48 M. L. J. 643 (P. C.).

Held, that the suit was governed by Art. 80 of the Limitation Act and time commenced to run from the date on which it should have been presented for payment at the specified place.

The Secretary of State v. *Prasad Bapuli*, (1922) I. L. R. 46 Mad. 259: 44 M. L. J. 685, referred to.

The effect of S. 18 of the Indian Securities Act is that even if the true owner of a promissory note has an enforceable claim against the Government according to the general law of limitation, he cannot enforce such payment after the lapse of six years from the date on which the payment is due under the promissory note. It does not extend the period of limitation up to the period of six years, if the person is otherwise disabled from suing because of the ordinary law of limitation.

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Appeal against the decree of the Subordinate Judge of Tellicherry in O. S. No. 2 of 1927 (O. S. No. 26 of 1926, District Court).

The Government Pleader (*P. Venkataramana Rao*) for appellant.

K. P. M. Menon and *D. A. Krishna Variar* for respondents.

The Court delivered the following

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JUDGMENTS. *Curgenven, J.*—The plaintiff is the Valia Raja of Kadathanad, having succeeded to the title on the death of the previous holder, Krishna Varma, in 1919. In 1918 Krishna Varma Valia Raja had subscribed for six war bonds of Rs. 1000 each and 60 Post Office cash certificates of Rs. 100 each. The point for decision in this case is, who became entitled to these assets upon Krishna Varma's death. The succession to the Sthanam, which comprises an estate as well as the title of Valia Raja, is regulated by the usual Malabar rule; there are two Kovilagams, called respectively the Edavalath and the Ayancheri Kovilagam, and the senior male member of the Kovilagams combined succeeds as Valia Raja. Krishna Varma himself derived from the Ayancheri Kovilagam, his successor the plaintiff from the Edavalath Kovilagam. The general proposition is not now disputed before us that on the death of a Valia Raja such of his assets as originated from the income of the Sthanam go to the Kovilagam from which he sprang, in the case of Krishna Varma to the Ayancheri Kovilagam. They do not under the ordinary law pass as accretions or otherwise to the Sthanam. When Krishna Varma died the securities in question were taken possession of by the senior member of that Kovilagam, Sankara Varma, now the 2nd defendant; and it is his case that by the ordinary rule of succession his Kovilagam is entitled to them. The plaintiff as Sthani

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sets up special grounds, which will be particularised later, to take the case out of the ordinary rule.

Before coming to the present suit we may glance briefly at the course of proceedings which led up to it. Not long after Krishna Varma's death, which occurred on 5th September, 1919, both the plaintiff and the 2nd defendant applied to the Revenue authorities for the transfer of the securities in their respective names. The 2nd defendant's letter to the Collector, Ex. V, is dated the 6th December, 1919 and that of the plaintiff to the Tahsildar, Ex. II, is dated the 22nd January, 1920. These applications evoked a reply from the Superintendent of Post Offices, Malabar Division, (Ex. B), that the amount of the war loan could only be paid on production of an order from a competent court of law. The plaintiff after some considerable delay then applied (Ex. I) for a succession certificate, making Sankara Varma respondent. The District Judge dismissed the application on the 16th August, 1922. Thereupon the plaintiff sued the present 2nd defendant, in O. S. No. 23 of 1923, on the file of the Subordinate Judge of Tellicherry, for a declaration of his title to these assets. While the suit was pending Sankara Varma succeeded in obtaining payment of the amounts due upon the war loan and Post Office certificates, and the plaintiff was allowed to amend his plaint to include a prayer for the recovery of the money. The suit was dismissed both upon the allegation of fact with which the plaintiff endeavoured to support his title and upon the issue whether, even if the plaintiff had proved his title, he could recover the money from the 2nd defendant. There was an appeal to this Court and the learned Judges who disposed of it, while agreeing with the Court below that the plaintiff could not recover the money, took a different view of the evidence relating to title. Having thus failed in his objective, the plaintiff then brought the present suit against the Secretary of State, on whose application Sankara Varma was impleaded as 2nd defendant. Substantially the same ground was travelled over, the depositions of some of the witnesses in the prior suit being by consent read as evidence. The learned Subordinate Judge of Tellicherry has found in favour of the plaintiff on the question of title, and has given him a decree for the recovery of the amount of the war loan, but has dismissed the claim in respect of the Post Office certificates as barred by limitation. The appeal is

preferred by the Secretary of State in respect of the former decision and the plaintiff has filed a memorandum of objections in respect of the cash certificates.

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Although the matter was at one time disputed, it is now common ground that the money with which these investments were made came from the income of the Sthanam, and, as already observed, it is not disputed that according to the ordinary law of succession the 2nd defendant's Kovilagam would have been entitled to them. The plaintiff must therefore put his case upon a special footing if he is to succeed. He in fact assumes two alternative positions. In the first place he alleges that Krishna Varma specifically appropriated these particular assets to the Sthanam with the intention that they should be incorporated with the rest of the Sthanam estate and pass to his successor as Valia Raja. The plaintiff's second position is that the ordinary law is overridden by a special family custom according to which all assets left by a Sthani pass to his successor in the Sthanam. [His Lordship after discussing the evidence negatived both the contentions of the plaintiff and proceeded:]

On the question of limitation, I do not think that the learned Subordinate Judge is right in his view that S. 18 of the Indian Securities Act (X of 1920) will give the plaintiff more time than he would otherwise have under the Limitation Act. That section says no more than that when the Government has made a payment due upon a security it shall be discharged from all liability in respect of the security after the lapse of six years from the date on which the payment was due. That merely puts an unconditional limit upon the time within which the claim may be made but does not extend the time in all cases up to that limit. The question remains open therefore whether this suit was in time under the ordinary law of limitation. The first point to decide is, what kind of instrument is a war bond. It has been argued before us that it is not a promissory note, either as defined in the Negotiable Instruments Act or in the Limitation Act. Now in the first place it is styled a promissory note, and the definitions in the two Acts appear to be wide enough to include it. The only specific argument advanced is that the presence of a stipulation with regard to presentment of the security at a named place (the General Treasury, Fort William) takes it out of the definition. The answer is furnished

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by the terms of S. 69 of the Negotiable Instruments Act, which provides that a promissory note payable at a specific place must, in order to charge the maker or drawer thereof, be presented for payment at that place. The Act clearly therefore contemplates promissory notes of this character. We have then to consider under what Article of the Limitation Act it should fall. Since the provision with regard to the place of presentment excludes it from the special Articles 69, 72 and 74 to 76, it seems clear that the residuary Art. 80 for a "suit on a bill of exchange, promissory note or bond not herein expressly provided for" must apply and that time runs from the date when the bill, note or bond becomes payable. This raises the further question whether the promissory note becomes payable on the date of maturity, which is the 15th September, 1921, or whether it would only be rendered payable by presentment in accordance with its terms. It is well settled that where a note is drawn for payment "at sight" or "on demand" and without more, no presentment is necessary; and in fact this is expressly stated in the exception to S. 64 of the Negotiable Instruments Act. Where however a note is made payable at a specified place the terms of S. 69, already quoted, require that there must be presentment in order to charge the maker thereof. Whether this latter phrase is equivalent to saying that the note does not become payable until that condition is complied with may not be perfectly clear. It has been argued that the words "in order to charge" relate only to the institution of a suit. But on all ordinary principles the liability to pay and the right to sue should be governed by the same conditions. If the maker is sued upon such a note, would it not be open to him to plead that no liability to pay had arisen as no presentment had been made? It appears to me that the reasoning employed by Schwabe, C. J., in *The Secretary of State for India* v. *Prasad Bapuli*[1], although it related to an instrument which was unusual in character and probably not a promissory note within the meaning of the Negotiable Instruments and Limitation Acts, was general enough in its terms to apply also to a case such as the present. If I may very briefly abstract it, it runs as follows: When money is payable on demand and nothing further is said—whether by prescribing a place for presentation or otherwise—time begins

1. (1922) I. L. R. 46 Mad. 259: 44 M. L. J. 685.

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to run at once. This principle is in this country to be found expressed in Arts. 59 and 73 of the Limitation Act. The words "on demand" are in fact to be regarded as mere words, and it is not really intended that any demand should be made before the liability to pay arises. In England it was formerly held that where a place for presentment was named, presentment at that place was necessary before a right to sue could arise. This rule has since been altered by Statute; but there has been no such statutory alteration of the law in India. We must look at the document and decide whether it was the intention of the debtor to insist on a demand at the place named. If such an intention can be inferred, then the debtor comes under no liability to pay until such demand is made. It is when the argument has reached this point that the terms of the instrument fall to be considered. It appears to me clear in the case of Government securities such as the present that the Government lies under no duty to seek out and pay its creditors, but that they must present their promissory notes at the place appointed for payment. I would therefore hold, with reference to the terms of the third column of Art. 80, that time, which runs from the point of time when the note becomes payable, does not run until presentment at the specified place has been made.

There is the further difficulty that there has in fact been no presentment by the plaintiff, the notes having been presented by the 2nd defendant and cancelled upon payment of the amount to him. In the circumstances I am of opinion that the plaintiff would be entitled to avail himself of the presentment already made, as the only reasonable conclusion on the facts. If that be so, admittedly the suit will be in time. But as my learned brother concurs in the view which I take of the merits of this case, the appeal is allowed and the suit dismissed with costs throughout.

The memo of objections is dismissed with costs.

Sundaram Chetty, J.

Sundaram Chetty, J.—My learned brother has dealt with the merits of the plaintiff's claim in its several aspects and I express my concurrence in the view taken by him. I do not propose to deal with those points once again, but I shall confine myself to the question of limitation raised in this case. The learned Subordinate Judge has held that the plaintiff's claim in respect of the war bonds is not barred by limitation. The correct-

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ness of that finding is challenged by the learned Government Pleader on behalf of the appellant.

These war bonds are six in number, each of them being for Rs. 1000. They were purchased by the late Krishna Varma Valia Raja who was the *stani* of the plaint-mentioned *Moopu stanam* and who died on the 5th September, 1919. The present plaintiff is his successor to the office of *stanam* abovementioned and has filed this suit for the recovery of the amount of those war bonds as the sole legal representative of the deceased *stani*. In order to understand under what category of documents the war bonds in question come, we may take Ex. IX as the sample. It is styled as a promissory note. The Governor-General of India in Council on behalf of the Secretary of State for India in Council promises to pay to the Accountant-General, Madras, or order at the General Treasury at Fort William on the 15th day of September, 1921, a sum of Rs. 1000 together with interest at 5½ per cent. per annum to be paid by equal half-yearly payments. This war bond is dated the 15th day of September, 1918. The definition of a promissory note is given in S. 4 of the Negotiable Instruments Act and a promissory note is also defined in S. 2 (9) of the Limitation Act (IX of 1908). There seems to be no substantial difference between the two definitions and the requisites of a promissory note as defined in either of those Acts are fulfilled in the case of the war bonds in question. It is contended on behalf of the respondent that, by reason of the specification in Ex. IX of the place where the amount of the promissory note is payable, it would not be strictly a promissory note as defined by the aforesaid Acts; but, if regard be had to some of the sections in the Negotiable Instruments Act, it is clear that by reason of the specification of a place for the re-payment of the amount, the document is not taken out of the category of promissory notes dealt with under that Act. S. 69 of the Act relates to a promissory note made payable at a specified place and S. 66 relates to a promissory note made payable at a specified period after date thereof. The wording of Ex. IX shows that it is a promissory note of this double character coming under Ss. 66 and 69 of the Act. It is not a promissory note payable on demand, for the words "on demand" do not appear in it at all, but it is a pro-note payable at a specified period after date thereof and at a specified place. We have to see which would be the appropriate Article of the

Limitation Act applicable to a suit on such a pro-note. Art. 69 deals with a suit on a promissory note payable at a fixed time after date thereof. Art. 71 relates to a suit on a bill of exchange accepted payable at a particular place, but this Article does not provide for a promissory note made payable at a particular place, nor does Art. 69 provide for such a pro-note. Nor does the promissory note in question come under Art. 72 or Art. 73. If none of the specific Articles relating to promissory notes can strictly apply to a promissory note of the type of Ex. IX, the only proper course is to apply Art. 80 which deals with a suit on a promissory note not expressly provided for in the Schedule. This Article provides a period of three years from the date when the note becomes payable. This is a general Article applicable to promissory notes which are not expressly provided for in any other Article. If the document in question is a promissory note—and I have no doubt that it is—Art. 80 cannot be overlooked, and it is only when even this general Article is found to be inapplicable we should resort to the final and residuary Article, namely, Art. 120, which provides a period of six years from the time when the right to sue accrues for suits for which no period of limitation is provided elsewhere in the Schedule. In my opinion, the proper Article applicable to the present suit, so far as it relates to the claim for the recovery of the amounts due on the war bonds in question is Art. 80 of the Limitation Act.

The next and the more difficult question is, what is the starting point for limitation? According to column 3 of Art. 80, limitation begins to run from the date when the note becomes payable. Under S. 66 of the Negotiable Instruments Act, a promissory note made payable at a specific period after date thereof, must be presented for payment at maturity, and under S. 69, a promissory note made payable at a specified place must, in order to charge the maker thereof, be presented for payment at that place. According to S. 22, the maturity of a promissory note is the day at which it falls due and every promissory note which is not expressed to be payable on demand is at maturity on the third day after the day on which it is expressed to be payable. The mode of calculating the days of grace is given in S. 23. According to the term of Ex. IX, the promissory note is expressed to be payable on the 15th September, 1921. It is not expressed to be payable on demand.

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It must be deemed to have been at maturity on the third day after that date, that is, on the 18th September, 1921. Presentment for payment at maturity is obligatory under S. 66 and similarly presentment for payment at the specified place in order to charge the maker thereof is obligatory under S. 69. It is only where the promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof (*vide* Exception to S. 64). This rule does not apply to the promissory note in question. It was at maturity on the 18th September, 1921, and not before, and its presentment for payment must be made on that date at the specified place as required by Ss. 66 and 69. As this is not a negotiable instrument payable on demand, S. 74 of the Act does not apply and there is no question of presentment for payment within a reasonable time. The question of what is reasonable time has been held to be a mixed question of law and fact. Such a question would arise for determination when presentment is optional, in which case the holder, if he chooses to present, may do so at any time before payment. In the case of a promissory note, like Ex. IX, there is no option in the matter of presentment and, in view of Ss. 66 and 69 of the Act, it must be presented for payment at the specified place on the 18th September, 1921, when the note really becomes payable according to law. That date seems to my mind to be the correct starting point for limitation for a suit on this promissory note under Art. 80 of the Limitation Act. When the note has thus become legally payable on the aforesaid date, limitation for enforcing the payment must be deemed to have commenced since then, and, unless a valid reason is made out of its cessation or suspense, the bar of limitation cannot be got over after the expiration of three years from the date when the limitation began to run. Where the date of the cause of action is so determined, it must be held that limitation has commenced to run from that date. Suppose the time for presentment of the note for payment was at the option of the holder, it can be reasonably urged that the note becomes payable on the date on which he chooses to exercise that option; but where the date for presentment is fixed to be a particular date according to the provisions of law applicable to a promissory note, or in other words, the date on which the promissory note becomes payable is determined to be a particular date according to the provisions

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of law. Limitation for a suit to enforce the payment must be taken to have commenced on the date on which it ought to have been presented, and the starting point cannot be altered by the act or omission of one party alone.

Reliance has been placed by the learned Advocate for the respondent on the decision reported in *The Secretary of State* v. *Prasad Bapuli*[1]. That decision rested upon the special terms of the promissory note and the main contention in that case was that, though the claim related to the amount due as per the pro-note, it had an indissoluble link with the previous agreement of 1824 entered into with the Company, whereby a specific trust was created and as such the case would come under S. 10 of the Limitation Act. The learned Trial Judge was of opinion that the claim based on the pro-note as a simple contract debt would be barred by limitation, but as it was a case of express trust coming under S. 10 of the Limitation Act, there would be no bar of limitation. But on appeal, it was held that the claim on the promissory note, even if looked upon as a simple contract debt, was not barred. In the first place, according to the terms of the document dealt with in that decision, the principal amount became payable *on demand*, after the expiration of 15 months from the date on which the Government gives the notice set out in the document. In the second place, there was no unconditional promise to pay the principal amount because the payment depended upon the Government exercising its option to give the notice or not (*vide* p. 276). In the next place in order to entitle the holder to payment, a demand after the expiration of 15 months from the giving of the notice was rendered necessary by the express terms of the document. On a proper construction of the terms thereof, it was held by Schwabe, C. J., that the words "on demand" were not mere formal words, but it was really intended that the demand should be made before the liability to pay arose. Great importance was also attached to the fact that the payment was to be made at a named place by the person liable. There was no time fixed for making the demand after the expiration of 15 months' notice to be given at some future time by the Government. No time was fixed for the giving of such a notice by the Government and it would appear that it was optional

1. (1922) I. L. R. 46 Mad. 259: 44 M. L. J. 685.

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with the Government to give such notice at any time and it was equally optional with the creditor after the expiration of the aforesaid 15 months' time to make a demand for payment at any time. In view of those special conditions, it was within the power of the parties to postpone the starting point of limitation as they pleased. But, in the present case, such features are absent and, as I have attempted to show, the date on which the note becomes payable has been determined to be a particular date and, according to the provisions of Ss. 22, 66 and 69 of the Negotiable Instruments Act which govern a promissory note such as Ex. IX, the date for the accrual of liability to pay the amount of the pro-note in question does not depend on the performance of an act at a time left to the option of one party or other as was the case dealt with in the aforesaid decision.

The present suit was filed by the plaintiff on the 13th September, 1926. Obviously, it was filed more than three years since the date on which the war bonds (promissory notes) became payable, that is, the 18th September, 1921. The cause of action must be deemed to have arisen when the notes became payable within the meaning of Art. 80 of the Limitation Act. In paragraph 15 of the plaint, the correct dates for the accrual of the cause of action have not been given. If the cause of action for a suit on these promissory notes should be held to have legally arisen on the 18th September, 1921, nothing has been stated in the plaint as a ground for exemption from the bar of limitation. The learned Subordinate Judge has, however, held that the suit is within time by reason of S. 18 of the Indian Securities Act (X of 1920). Ss. 17 and 18 of this Act deal with cases wherein the Government is absolutely discharged from all liability. S. 17 deals with immediate discharge of liability in the cases specified therein. In the present case, the Government has paid the amount of these war bonds to the 2nd defendant in June, 1924. These bonds were endorsed as discharged and cancelled on the 6th June, 1924, by reason of such payment. The plaintiff claiming to be the real legal representative of the deceased holder of those war bonds seeks to recover the amount due thereunder from the Government, despite the payment made to the 2nd defendant. His case is that his rights cannot be defeated by reason of the payment made to the 2nd defendant who, according to his contention, was not entitled to receive the payment. S. 18

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of the said Act lays down that, except as otherwise provided in this Act, the Government shall be discharged from all liability in respect of the securities on which a payment has been made after the lapse of 6 years from the date on which payment was due. This section fixes a period of six years from the date on which the payment was due as the limit of time beyond which the Government is immune absolutely from liability on the pro-notes. This contemplates a case of the true owner or a person having a paramount title suing for the money due under the promissory notes in spite of the Government having paid the same to some other person. This is mainly a provision intended for the benefit of the Government who cannot, in any event, be made liable to pay the amount of such pro-notes at the instance of the rightful owner after the expiration of the time limit fixed in the section. If the claim of the rightful owner becomes barred by limitation even within the said period of six years, is it be understood that, by reason of the provision in S. 18 of the Indian Securities Act, an extension of the period of limitation afforded to him under the general law is given to him? There is nothing in S. 18 to warrant such an inference. It is noteworthy that there are no words in S. 18 indicating that this period is fixed notwithstanding anything contained in the Limitation Act. If it was meant that the period of limitation allowed to a creditor to sue on such pro-note was overridden by the provision contained in this section, the legislature would have used express words to convey such a meaning. What seems to me is that, even if the true owner has an enforceable claim against the Government according to the general law of limitation after the lapse of six years from the date on which the payment was due under the promissory notes, he could not enforce payment by the Government by reason of this special time limit. This is not a provision to enable a person disabled from suing under the ordinary law, by extending the period of limitation open to him. It is obligatory on a creditor to make out that his claim is not barred under the ordinary law. The learned Subordinate Judge states that, if the liability of the Government is discharged only after the six years mentioned in the section, the true owner is also entitled to enforce his right within that period. I think the conclusion does not necessarily follow from the premise.

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For all the foregoing reasons, I am of the opinion that the plaintiff's suit to enforce payment on the war bonds in question is barred under the general law of limitation, and S. 18 of the Indian Securities Act cannot be invoked for his aid in order to extend the period of limitation allowed to him under the general law. I should think that the plaintiff's claim in respect of the war bonds must fail on the ground of limitation also.

The Lower Court has held that the plaintiff's claim for the amount payable under the Post Office cash certificates is barred by limitation. A memo of cross-objections has been filed by the plaintiff in respect of the claim disallowed. But the plaintiff's claim to the amount of these certificates fails on the merits, as shown by my learned brother in his judgment.

I agree with my learned brother that the appeal should be allowed and the memo of objections should be dismissed, and also concur in the order as to costs.

B. V. V. *Appeal allowed.*
Memo of Objections dismissed.

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Island of Ceylon.]

PRESENT:—LORD ATKIN, LORD TOMLIN AND LORD MACMILLAN.

O. A. P. R. M. A. R. Adaikappa Chettiar .. *Appellant**

v.

Thomas Cook & Son (Bankers), Ltd. .. *Respondents.*

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Deed—Construction—Supply of words contrary to wording of instrument—Permissibility—Special powers followed by general words—Authority of agent—Power to "endorse" and "pay"—Power to "back" bills not included.

There is no principle of construction which permits a document contrary to its actual wording to be read as though it followed a proposed precedent unless between the parties it has been rectified or at least is such as would by the Court be rectified.

The question at issue was if the acting manager of the defendant Bank had the authority to certify cheques drawn by a constituent as good for payment on a future day. It depended primarily upon the construction of the power-of-attorney granted to him. The plaintiff who contended that it was within the authority of the manager to do so, sought to read the word "accept" in the power-of-attorney, suggesting that it had been omitted by a copyist's error in copying the clause from the power-of-attorney granted in favour of another official of the Bank.

Held, (*i*) that such a construction was inadmissible;

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*P. C. Appea No. 106 of 1930. 25th November, 1932.

(ii) that the power to "endorse" did not confer the power to "back" bills on behalf of the bank;

(iii) that the power to "pay" cheques did not include the power to "promise to pay".

The general words in the later clauses of a power-of-attorney should be read with the special powers given in the earlier clauses and cannot be construed so as to enlarge the restricted powers there mentioned.

Appeal No. 106 of 1930 from a judgment and decree of the Supreme Court of the Island of Ceylon.

Stuart Bevan, K. C. and *H. I. P. Hallett* for appellant.

D. N. Pritt, K. C. and *R. O'Sullivan* for respondents.

25th November, 1932. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal from the Supreme Court of the Island of Ceylon in an action in which the plaintiff sought to recover from the defendants the sum of Rs. 170,000 on four cheques or alternatively as money had and received.

The action was tried in the District Court of Colombo, where the plaintiff recovered judgment. On appeal to the Supreme Court the judgment of the District Judge was reversed and the action dismissed with costs. The plaintiff is a money-lender carrying on business at Colombo, and the dispute arises out of a series of transactions in which the plaintiff, one M. S. Peiris, now deceased, carrying on business as Don Philip & Co., and, as is alleged, the defendants, acting through John Davis, their acting manager, were engaged. Peiris was a trader who before the events in issue had become insolvent; his certificate had been suspended for seven years, but he continued to trade through a former servant in the name of Don Philip & Co. In 1924 the defendant Bank was registered. It took over the banking business of the well-known tourist agency. The agency business and the banking business were conducted in the same building. Mr. Smith controlled both businesses; but the banking business under Smith's general control was managed by Mr. John Davis. In 1925 Mr. Davis was given a power-of-attorney by the Company's general representative in the East, Mr. S. E. Humphreys. One of the questions in dispute is whether the terms of the power-of-attorney authorised Davis to bind the bank to perform the obligations which the plaintiff seeks to enforce. Mr. Peiris, as Don Philip & Co., appears to have had dealings with the defendant Bank before Davis came on the scene. He appeared to be doing an active business as a

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produce broker, and Davis allowed him a small overdraft. In June, 1925, Davis made Peiris an advance against shipping documents of tea. The consignees refused to take up the documents, and the result of the transaction was that Peiris' account was overdrawn to the extent of over Rs. 16,000. Mr. Smith appears throughout to have disapproved of advances being made to Peiris, and he instructed Davis to take steps to have the overdraft paid off. In October Peiris borrowed the money from one Ramachandra, who was only willing to advance on the terms that the Bank guaranteed payment. On October 17, 1925, Peiris drew a cheque on the defendant Bank for Rs. 17,000 in favour of Ramachandra, and Davis wrote on the back of the cheque "Good for payment on December 17, 1925," or words to that effect, and signed it *per pro* Thos. Cook & Son (Bankers), Ltd., John Davis. In exchange for this document Ramachandra made the agreed advance of Rs. 16,500 by his cheque of October 17. On December 17 Peiris' account was only in credit Rs. 4. Davis could not ordinarily allow the cheque to be paid without debiting Peiris' account and thus re-establishing the overdraft which he had been directed to end. Accordingly, when the cheque was met, Davis directed a transfer to Peiris' account of a credit entry "Cash ex selves, 17,000," and made a fictitious entry in the Bank's Till book "Safe, 17,000," which served to avoid discovery of what had taken place.

This was obviously but a temporary device and measures had to be taken to give a better appearance of regularity to the transaction. On December 29, 1925, Peiris entered into the first of a series of transactions with the appellant which culminated in January, 1928, in the negotiation of the documents in suit. Peiris asked the appellant to cash a cheque of Don Philip & Co. drawn on the bank; the appellant refused, but on being told on a later occasion that the bank would agree to pay the cheque on a future date, he agreed. Accordingly Peiris gave the appellant a cheque, dated December 29, 1925, for Rs. 20,000, drawn in the name of Don Philip & Co. on the bank, endorsed "Good for payment on January 12, 1926, *per pro* Thos. Cook & Son (Bankers), Ltd., John Davis." In return the appellant gave to Peiris a cheque of even date in favour of Don Philip & Co., which was cleared through the Bank. Davis gave to the appellant at the same time a memo-

randum, "Received for credit of Don Philip & Co. cheque on National Bank of India for Rs. 20,000," with the same signature as to the indorsement. Rs. 3,000 was placed to the credit of Don Philip; the balance was used to put the Bank books in order by cancelling the fictitious entry of "17,000 in safe". On January 12 the Don Philip account was not in sufficient credit to meet the guaranteed cheque. Another fictitious entry had to be made, until January 21, 1926, when another similar cheque transaction was entered into for Rs. 37,500, with a bank guarantee for payment on February 4. This was further met by a third cheque transaction on February 4 for Rs. 18,000, payable on March 5.

So the transactions went on month by month: sometimes the cheques being plainly renewals in whole or in part: sometimes constituting fresh advances; in all cases where there was not immediate renewal the account of Don Philip was kept in credit by a fictitious entry until the necessary cheque arrived of the appellant.

Some of the apparent increase in advances no doubt represented interest; in other cases the interest charges were paid by separate cheques of Don Philip & Co. Between December 29, 1925, and January 3, 1928, 75 cheques had been exchanged, varying in amount from Rs. 5,000 to Rs. 75,000. In May, 1927, the appellant changed the system and thenceforth drew his cheques in favour of Thos. Cook & Son, crossing them "Account payee only". This seems to have been the result of a local case in which a person who received cheques drawn in favour of his employers and so crossed was held to be unable to negotiate them so as to make the drawer liable. The effect, if any, of this change of procedure will be considered later. In September, 1927, Peiris came to the appellant with a request that he would not present the cheques indorsed by Davis, but would take in substitution a cheque drawn by Don Philip bearing the due date, and on payment of such cheque would return the indorsed cheque. The story told by Peiris was that in this manner he would escape paying commission to the Bank. Davis, on being applied to, confirmed this remarkable explanation, and the appellant acceded to the request. We now come to the final stage of these transactions.

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On January 3, 1928, there were outstanding in the appellant's possession three cheques of Don Philip indorsed by the Bank for payment on various days:—

(1) December 17, 1927, for Rs. 35,000, payable by the Bank on January 16, 1928.

(2) December 23, 1927, for Rs. 50,000, payable by the Bank on January 7, 1928.

(3) December 23, 1927, for Rs. 50,000, payable by the Bank on January 21, 1928.

But Davis had ceased to enjoy the Bank's confidence. Some inquiry into his alleged practice of giving guarantees on behalf of the Bank had been made in October, though nothing had been done. But on December 29, 1927, Mr. Humphreys learned that Davis had written a letter to another Bank guaranteeing the production of certain shipping documents (apparently a completely genuine transaction). He suspended Davis and there and then revoked his power-of-attorney, marking it as cancelled.

On January 3 the balance of Don Philip's account was only Rs. 652. The outstanding cheques would have to be met. The appellant was willing to renew and even to make a fresh advance on receiving the usual Bank guarantee. January 3 was a bank holiday. The appellant's manager, Somasundaram, met Peiris and Davis at Peiris' warehouse. Somasundaram received four cheques drawn by Don Philip in favour of the appellant and dated January 3, 1928, for Rs. 35,000, Rs. 50,000, Rs. 35,000 and Rs. 50,000, each indorsed respectively, "Payment of this cheque on 5th (6th, 7th, 8th) March, 1928, guaranteed, *per pro* Thos. Cook & Son (Bankers), Ltd., John Davis." In return Somasundaram gave to Davis or Peiris cheques, dated January 3, 1928, for Rs. 35,000, Rs. 50,000, Rs. 50,000 and Rs. 20,000 drawn in favour of Thomas Cook & Son (Bankers), Ltd., or order, crossed "Not negotiable, payee's account only," and a fifth cheque drawn as open cheque to Don Philip & Co. for Rs. 15,000, as Peiris said he desired that amount of cash. In respect of the cheque for Rs. 20,000 and the open cheque for Rs. 15,000, Davis at Somasundaram's request gave a receipt, "Received to our credit the sum of Rs. 35,000 as per reverse, *per pro* Thomas Cook & Son (Bankers), Ltd., John Davis," and on the reverse—

"Rs. 15,000 cash
20,000 cheque balance

Rs. 35,000."

On January 4, 1928, Peiris or some one on his behalf paid into Don Philip's account with the bank the four cheques making Rs. 155,000. No one seems to have thought it unusual that he should be paying in cheques drawn to the order of the Bank. The cheques were stamped on the face with Thomas Cook's stamp, apparently at the Clearing House or for Clearing House purposes, and were credited to Don Philip's account and served to meet the outstanding cheques falling due in January, for which, as before, the unendorsed cheques of Don Philip were substituted. In March the cheques for Rs. 155,000 were presented, but were returned "Account closed". On January 27, 1928, the bank had closed Don Philip's account and had paid over the then credit balance of Rs. 825.

In proceeding to discuss the liability of the Bank, it has to be remembered that the Courts have negatived any lack of good faith on the part of the appellants, and that Davis was not cross-examined to suggest that he derived any personal advantage from his proceedings. A specific issue as to whether the plaintiff or his agents had knowledge of a conspiracy by Davis and Peiris to defraud the bank was negatived by the Trial Judge.

The case against the Bank was made under two heads:—

(1) The bank were liable on the contract contained in the cheques because Davis had actual authority to make such a contract.

(2) If no such contract was in fact made, then the bank were liable in the amount of the cheques for money had and received either as money paid for no consideration, or on a consideration which had wholly failed, or for money paid under a mistake of fact.

The first question to determine is what was the contract made between the parties. The plaintiff alleged that he lent the money to the Bank. In support of this view he relied on the fact that his later cheques, including those that he gave on the transaction in question, were drawn in favour of the Bank, marked "Not negotiable" and "Payee's account only". Their

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Lordships, however, are clearly of opinion that the money throughout was lent to Peiris. He drew the cheque in repayment, and he paid the interest. The plain business was that money was lent to Peiris and purported to be guaranteed by the bank. Had then Davis actual authority to guarantee payment of these loans by Peiris? This depends primarily upon the construction of the power-of-attorney, though it is also possible that beyond the express powers of the power-of-attorney there might be actual implied authority necessarily arising from the service of Davis as acting manager of the bank. The plaintiff faintly suggested such an authority, but mainly relied on the express words of the power-of-attorney. Oddly enough, both parties contended that the words on the cheque were an acceptance of the cheque. The plaintiffs sought to read the word "accept" into clause 4 of the power-of-attorney, suggesting that it had been omitted by a copyist's error in copying the clause from the power-of-attorney given to Mr. Humphreys on August 1, 1924. Though this construction found favour with the District Judge, it appears to their Lordships quite inadmissible. There is no principle of construction which permits a document contrary to its actual wording to be read as though it followed a proposed precedent unless between the parties it has been rectified or at least is such as would by the Court be rectified. In the present case, however, there seems to be little doubt that the omission was intentional. The defendants, relying upon the omission, seek to make the promise an acceptance in order to place it outside the authority given by the document. They say that the writing was in the terms of S. 17 (1) of the Bills of Exchange Act, the signification by the drawee of his assent to the order of the drawer, and that as by S. 19 an acceptance may be qualified as to time, all the requirements of a valid acceptance are present. So far as is relevant to this point the statutory provisions in force in Ceylon at the material dates were equivalent to those of the Bills of Exchange Act, 1882. No doubt as between the immediate parties to a bill an acceptance may express only a contract of guarantee, which in reality, as has been said, this was. No doubt also a cheque may be accepted, however unusual such a transaction is. Anything less like the ordinary business conception of an acceptance in form and intention than this contract it would perhaps be difficult to find. Their Lordships

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find it unnecessary to decide whether this was an acceptance or not, for whatever it be called it appears to them not to be within any of the express powers given by the power-of-attorney. It was said to be an exercise of the power to "endorse". In their Lordships' view, this power-of-attorney should not be construed as giving Davis the power to sign otherwise than as drawer or acceptor or holder so as to cause the Bank to "incur the liabilities of an indorser" under S. 56 of the Bills of Exchange Act. It never was intended that the Bank servant should "back" bills on behalf of the Bank. Equally unwarranted is the suggestion that the power to "pay" cheques, etc., involves the power to promise to pay. The general words in clauses 9 and 10 must be read with the special powers given in the earlier clauses, and cannot be construed so as to enlarge the restricted powers there mentioned. It follows that Davis had no actual authority given him by the power-of-attorney to guarantee payment of these loans by Peiris. Their Lordships are also quite satisfied that his position in the Bank was not such as to make it necessary to imply the power to enter into these transactions on the part of the Bank. They appear on the evidence and according to ordinary banking usage to be quite outside a manager's general authority. This last consideration would dispose of any question of ostensible authority; but as the plaintiff twice examined the power-of-attorney and plainly relied only on the evidence of actual authority, any reliance on ostensible authority was properly negatived in the Courts below, and was not pressed before their Lordships.

It remains, therefore, to consider the question of the plaintiff's rights, if any, on the footing that no contract was in fact made between him and the Bank. If, as the plaintiff contended, the apparent contract was that the money had been lent to the bank, or that the bank otherwise was to have the disposition of the money, there could be no doubt as to the plaintiff's right. He would have performed his part of the contract, relying upon a supposed effective promise of the bank to repay. On proof that such promise was not made he could recover the money as having been paid without consideration. Whether he could recover it as money paid under a mistake of fact is not so clear. It is necessary to establish this cause of action that the mistake should be as to some fact causing a liability to pay. Cash handed over under a voluntary contract

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hardly comes within that description. It was ingeniously contended by Counsel for the plaintiff that while plaintiff's cheque may not have been handed over under any mistaken belief that he was bound to part with it, payment of his cheque was made under the mistaken belief that he was bound to honour it under a binding contract with the Bank. It seems unnecessary to discuss this refinement, for if the Bank received the money at their own disposal under a mistake by the plaintiff as to the supposed agent's authority, they would have to return it. But, in fact, the Bank received the money on the terms that it should be placed to Peiris' credit. The transaction was one by which the supposed contract as between the three parties required that the money represented by the cheque drawn in favour of the Bank should be made available to Peiris in his account kept with the Bank. In no other way in the circumstances could Peiris fairly become indebted to the plaintiff so as to be liable on the cheque which Peiris drew and the Bank guaranteed, or become liable to pay interest, as in fact he did. In no other way could the cheques of the plaintiff serve to effect a renewal (as undoubtedly was intended) of the outstanding cheques for Rs. 135,000 replaced in accordance with the practice of the parties by the cheques of Peiris alone. The Bank dealt with the plaintiff's cheques precisely as they were intended to deal with them under the supposed contract. They collected them for Peiris' account, placed the entire proceeds to Peiris' credit, and out of the proceeds the outstanding cheques in favour of the plaintiff were met. The Bank are in the position of a mandatory who has fully performed his mandate, before any mistake has been discovered. In these circumstances the Bank are not liable to repay money to the plaintiff which they have disposed of according to the plaintiff's wishes in accordance with the supposed contract.

As a final bit of salvage, Counsel for the plaintiff contended that at any rate as the result of the series of transactions the Bank received from the plaintiff's money payment of the original Rs. 17,000 which in December, 1925, they had paid to Ramachandra. The answer to this is that that advance had long before been repaid to the Bank by Peiris by the numerous credit payments which he had made since that date in accordance with the ordinary principles applicable to appropriation of payments.

The simple result is that the plaintiff is found to have advanced money to Peiris on an invalid security, and that he and not the Bank must bear the loss. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs.

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Solicitor for appellant: *O. A. Cayley.*

Solicitors for respondents: *Field Roscoe & Co.*

S. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Ontario.]

PRESENT:—LORD ATKIN, LORD TOMLIN AND LORD THANKERTON.

Florence A. Deeks .. *Appellant**

v.

H. G. Wells and others .. *Respondents.*

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Deeks v. Wells.

Copyright—Infringement of—Intrinsic evidence—Nature and sufficiency of—Expert witnesses—Opinion of—Propriety of.

An infringement of copyright in a literary work may be proved by intrinsic evidence consisting of a large number of similarities, of like omissions, of plan, of phrases and of mistakes. But such evidence must be of the most cogent force sufficient to give rise to an irresistible inference that the one work was copied from the other before it can be accepted as against the oath of respectable and responsible people that there was no copying in fact, in a case where the suggested similarities could be explained by the nature of the work and the authorities to which the authors had recourse, which were common to both.

Where in a case of this kind, experts are called to point out the coincidences, similarities and omissions to be found in the two works, they cannot be permitted to offer their opinion that the one should have been copied from the other.

Appeal No. 18 of 1932 from the judgment of the Second Appellate Division of the Supreme Court of Ontario, which affirmed the judgment of Mr. Justice Raney in the Supreme Court of Ontario which dismissed the plaintiff's action.

Appellant in person.

Arthur T. Macmillan for Macmillan & Co.

G. I. Paull for H. G. Wells.

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*P. C. Appeal No. 18 of 1932. 3rd November, 1932.

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3rd November, 1932. Their Lordships' judgment was delivered by

LORD ATKIN.—This is an appeal from the judgment of the Second Appellate Division of the Supreme Court of Ontario, which affirmed the judgment of Mr. Justice Raney in the Supreme Court of Ontario which dismissed the plaintiff's action. The action is brought by the plaintiff, Miss Florence Deeks, for breach of copyright, but in substance the action is for breach of confidence in permitting the plaintiff's unpublished manuscript to be used without the plaintiff's consent. The action is brought against the Macmillan Company of Canada, which is the company to which the plaintiff entrusted her manuscript, it is brought against Mr. H. G. Wells, who is said to have used the manuscript of the plaintiff improperly as the foundation of his book, " The Outline of History," and it is brought against the Macmillan Company, Incorporated, of New York, Messrs. George Newnes, Limited, and Messrs. Cassell & Company, Limited, for having published the work of Mr. Wells which had been so composed.

Now whether or not the book was used, handed over to Mr. Wells, and whether it was improperly used by him are pure questions of fact. Upon those questions of fact both Courts have come to a conclusion against the plaintiff; and it would follow that, in accordance with the usual practice in dealing with appeals of this Board, there being two concurrent findings of fact, the Board would not hear an appeal which suggested that those findings were wrong. But Miss Deeks appears in person, she evidently thoroughly believes in her case, and it was important, their Lordships thought, in the interests of everybody that the case should be fully heard. They therefore made a special exception in her favour and have allowed her to open the case at length, and their Lordships proceed to decide it without any reference to the general rule as to concurrent findings.

The position is that Miss Deeks in August of 1918 entrusted her manuscript entitled " The Web " to the Macmillan Company of Canada. The manuscript was of a work which involved the whole history of the world from its very beginning to the present day, with the special object of emphasising the important part that women had played in the social development of the world. The book was entrusted to the Macmillan Company in Canada on the 8th August, 1918. It was left with

them by Miss Deeks for two purposes. One purpose was to ascertain whether there would be any objection to the use by her of certain extracts from Green's "Short History of the English People," the copyright of which was owned by Messrs. Macmillan in London. Together with a request that they should afford her information on that point, they were generally asked to advise her as to the prospects of the work as a publication. Apparently Messrs. Macmillan in London control the Macmillan Company of Canada and the Macmillan Incorporated Company of New York.

The manuscript was examined by Mr. Saul, who occupied the position of editor of their works and was the person before whom manuscripts would naturally come. The exact story of what he did with the manuscript is not quite clearly recorded; but it is quite plain, their Lordships think, that he took the manuscript, he read it once and then he read it a second time, and his recollection is that he took it with him to Winnipeg and the Pacific Provinces and returned with it to Ontario at some date in November. He left the employment of Macmillans in Canada in January of 1919. The writ was not issued until 1925, and a long time had elapsed, no doubt, since he had occasion to deal with the question of the manuscript, though it appears that some reference had been made to him before the writ had been actually issued. There is an entry in the book that records the dealing with manuscripts to the effect that the book was received on the 8th August of 1918 and was returned in February of 1919. In the opinion of their Lordships that record is incorrect. It seems that the manuscript was not returned in fact to Miss Deeks until April of 1919. There is an entry of another manuscript in the record book, which is called "The Dawn," which happens to be the title of the first chapter of Miss Deeks's book, which in their Lordships' opinion is also an incorrect entry, because it is not adequately explained what that manuscript is. It is recorded as being returned in July of 1919, and it appears to their Lordships plain that the manuscript which was returned in July of 1919 is not a manuscript which was or could be described as "The Dawn". That is left uncertain, and all their Lordships can say about it is this, that in view of the period that elapsed between the time when the manuscript was being dealt with by the Macmillan Company of Canada and the time in 1925 when they were first

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challenged with their dealing with it, it is not at all unnatural that there should be difficulties in explaining records which, as they stand, do not give satisfactory information to anybody and raise slight difficulties which have not been entirely cleared up.

During that period between August, 1918, and April of 1919 Mr. Wells appears to have completed the manuscript of his book, "The Outline of History," which book also is written as a history of the world from the beginning, dealing, as an ultimate object, with history from a rather different point of view from that which had been undertaken by Miss Deeks. Therefore, so far as the coincidence of time is concerned, if the manuscript had left Canada and had reached London it is, of course, possible that Mr. Wells might have had an opportunity of seeing the work and using it; and, of course, direct evidence had to be given in respect of this matter.

The evidence of Mr. Saul was that, so far as he was concerned, to his knowledge he had not parted with the manuscript; and it is difficult to see who could have dealt with the manuscript except Mr. Saul himself. The evidence on behalf of Macmillans in London, the evidence of Sir Frederick Macmillan, the Chairman of the Board, is that every manuscript would come before the Board and that the Board had certainly never seen such a manuscript and, indeed, had not heard of Miss Deeks. The evidence of Mr. Wells is quite clear and definite, that he had never seen the manuscript, he did not know of Miss Deeks, he had not taken any part of the information that she had put in her manuscript from that manuscript or from Miss Deeks herself; and there is no direct evidence on behalf of Miss Deeks that the manuscript ever did in fact leave Canada.

So far as that goes, the Courts have accepted the evidence of Mr. Wells and the evidence given by the Macmillan Companies, and they have come to a conclusion quite definitely that the plaintiff's case is unfounded and that the manuscript was not handed to Mr. Wells, and that Mr. Wells had in fact never used it.

But, apart from the direct evidence, Miss Deeks relies upon the intrinsic evidence to be derived from a comparison of the two works; and she says that when you compare the one work with the other you will find that there is such an accumulation of similarities, of like omissions, of plan, of phrases, of mistakes,

that the inference is irresistible that Mr. Wells did in fact have her work before him before he composed his work. Now their Lordships are not prepared to say that in the case of two literary works intrinsic evidence of that kind may not be sufficient to establish a case of copying, even if the direct evidence is all the other way and appears to be evidence that can be accepted; but such evidence must be of the most cogent force before it can be accepted as against the oath of respectable and responsible people whose evidence otherwise would be believed by the Court.

Therefore, it becomes necessary to consider the class of evidence that is brought forward on behalf of the plaintiff in respect of this comparison and the inference that ought to be drawn as the result of the comparison. Miss Deeks relied in the Courts below upon the evidence of three literary gentlemen of considerable reputation who were entitled to be treated as experts on this subject. They pointed out coincidences, similarities, identical omissions, and so forth, which in their view led to the inference that one work was the copy of the other. Their Lordships have read that evidence, and they notice that the expert witnesses were allowed in the Court below to give evidence as to the result of their opinions, and as to the effect of them, which appeared to their Lordships not to be within the domain of expert evidence at all. The witnesses were apparently permitted to say, not only that there were similarities, but that in their opinion the result of the similarities was such that in fact Mr. Wells did copy from this work—which, of course, is not a matter for expert testimony at all—and, indeed, one witness was permitted to give evidence to the effect that in his opinion Mr. Wells wrote his own book with the manuscript of Miss Deeks's book upon the desk before him—evidence which quite plainly was not a matter for expert opinion. However, such evidence was given, and it was before the Court and it was considered by the learned Judges.

Now the points upon which the experts rely have been correctly summarised by Miss Deeks in this respect. She says that the copying took place as is shown by similarities with regard to the plan—that means the plan of the book, the scheme of the book; that the opening chapters and various passages appearing in Mr. Wells's book are mere colourable alterations of "The Web"; that there are certain phrasal identities and similarities, and there are certain mistakes; that the similarities,

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though trifling in some instances, are so numerous that an accumulation of them afford the strongest evidence of copying; and that there were common sources used for both works which could be shown to have been used in both cases together with the original additions made by Miss Deeks, so that when you compared the two you found that Mr. Wells had used not only the common source but had also modified it by using in addition to that the original manuscript of Miss Deeks. She relied on the choice and the sequence of the order of details, and she relied on the emphasis and proportion given to certain topics. Those matters were carefully discussed in the Courts below; they have been dealt with by the judgments in both Courts, and they have been very fully discussed before their Lordships by Miss Deeks who in the course of her case has given every assistance to the Board and made it quite plain that the whole strength of the case has been put forward upon this appeal. Their Lordships wish to repeat what was said in the Courts below, that Miss Deeks has argued the case with great candour and with great force.

Now their Lordships do not propose to go into the details of all these matters. They wish it to be understood that they have carefully considered all the points that have been put before them, and, having considered them, they are quite convinced that the case made in this respect is quite insufficient to displace the conviction that is derived from the direct evidence that there was in this case no copying in fact. The suggested similarities can be explained by the nature of the work, which has common elements, and by the fact that both writers must have had recourse to authorities which were common to both. After all, neither Miss Deeks nor Mr. Wells was present at the beginning of the world or until a very considerable time later, and they have had to rely upon the accumulation of information which has been made by many authors before them and to which they have had to have recourse in writing such a work as this. Their Lordships do not pause to deal with the details of the evidence that was given, but in a great many cases it is quite properly described by one of the Judges as fantastic, and such actual coincidences as do exist are quite explicable, and should be explained, in the manner suggested.

The result is this: that in the opinion of their Lordships not only did Miss Deeks fail to make out her case, but that it

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was definitely established that the manuscript in this case did not leave Canada and that Mr. Wells did not have any access to it and did not use it at all in the preparation of his work. It is very doubtful whether anything that this Board says or that any Court says will be likely to alter Miss Deeks's opinion of the merits of her case, but at any rate she will have the satisfaction of knowing that the case has been very fully considered now by three Courts and that the conclusion must be the same in all of them, namely, that the case that she made was definitely disproved. The result of that is that their Lordships must humbly advise His Majesty that this appeal should be dismissed, and the appellant must pay the costs of the appeal. There was a petition for leave to adduce further evidence or add to the record, but that petition was not opened.

Nothing need therefore be said about the petition, except that no order is made upon it.

Solicitors for Macmillan & Co.: *Broad & Son.*

Solicitors for H. G. Wells: *Gedge Fiske & Co.*

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE MOCKETT.

N. K. N. Ramier and Brothers .. *Appellants* (Plaintiffs)*

v.

S. S. Ramudu Ayyar and another .. *Respondents (Defendants).*

Ramier and Brothers v. Ramudu Ayyar.

Sale of goods—Repudiation of contract by buyer on one ground—Subsequent justification of refusal on another ground after expiry of the time for delivery—Permissibility—Seller electing to keep contract alive in spite of repudiation—Effect of—Seller not discharged from his obligation to tender—Contract Act (IX of 1872), S. 39—(Indian) Sale of Goods Act (III of 1930), Ss. 37 (3) and 60.

Where the buyer refused to take delivery of goods on the ground that, contrary to the custom of the trade, delivery was not made as and when the bales were ready at the Mills, he is not entitled, after the time for delivery has expired, to justify his refusal on another ground, *viz.*, that some of the goods tendered were not of the kind or quality contracted for.

Braithwaite v. *Foreign Hardwood Co.*, (1905) 2 K. B. 543; *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Co.*, (1923) A. C. 48; *Raynlu Aiyar*

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*S. A. No. 1060 of 1928. 2nd August, 1932.

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v. *Kuppu Aiyar*, (1924) 49 M. L. J. 1 and *Nannier* v. *Rayalu Iyer*, (1925) I. L. R. 49 Mad. 781, followed.

Where the seller did not elect to treat the refusal by the buyer to take delivery of one instalment of the goods as a repudiation of the entire contract, the contract is kept alive for the benefit of both parties. The seller remains subject to all his own obligations and liabilities on it and enables the buyer not merely to complete the contract, if so advised, notwithstanding his previous repudiation but also to take advantage of any supervening circumstance, *e. g.*, the failure of the seller to make a tender, to justify his declining to complete it.

Frost v. *Knight*, (1872) L. R. 7 Ex. 111, applied.

Appeal against the decree of the District Court of Madura in A. S. No. 232 of 1926 preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 73 of 1925.

T. R. Venkatarama Sastri and *N. Rajagopalan* for appellants.

Nugent Grant, T. Krishnaswami Aiyangar and *S. K. Narasimhachari* for respondents.

The judgment of the Court was delivered by

Jackson, J.

Jackson, J.—The appellants-plaintiffs and respondents-defendants are Madura cotton brokers who on 21st August, 1918, Ex. VIII, engaged with others in what is known there as a chain contract.

The Mills of Messrs. Harvey were to produce 60 bales of certain counts, and, as they passed down the chain, these were to be received by Messrs. Ramudu Ayyar, the defendants, and sold by them to Messrs. Ramier & Bros., the plaintiffs, who will be described henceforth as the sellers and the buyers, because in a previous litigation their position was reversed and the terms plaintiffs and defendants will only lead to confusion.

28 bales were tendered by the sellers, and taken delivery of by the buyers.

9 bales were tendered (as will be shown below) by the sellers and rejected by the buyers. 23 bales have never been tendered at all.

The buyers now sue for a return of the advance made by them to the sellers on the date of the contract with interest thereon in respect of the 32 bales of which they did not take delivery. The suit has been dismissed by both Lower Courts, and the buyers appeal.

We agree with the lower appellate Court that the terms of Ex. IX clearly constitute a tender of the 9 bales on 15th November, 1918.

On 19th December, 1918, Ex. X, the buyers complained that contrary to the custom of the trade deliveries were not being made as and when the bales were ready at the Mills, and therefore they refused both to admit liability for the 28 bales already delivered, and to take delivery of the 9 bales tendered on 15th November, 1918.

It came out in the course of another suit between the parties that 3 out of these 9 bales had been bought from the Mills at a price less than that contracted for in the chain contract, Ex. VIII, and therefore the buyers would have been justified, on these grounds, in refusing not only the 3 defective bales but the whole instalment. The point is not one covered by the Indian Contract Act, but is clearly laid down in the English Sale of Goods Act, 1893, which embodies the existing law on the subject.

Section 30 (3): "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may . . . reject the whole."

This section has been repeated since this suit began in S. 37 (3) of the Indian Sale of Goods Act (III of 1930) and the parties are agreed that, whatever be its interpretation, this is the law on the subject.

Therefore if on 19th December, 1918, the buyers had said we reject the 9 bales because 6 good are mixed with 3 bad bales, they would have been within their rights. The sellers might then immediately have tendered the six good bales as a fresh instalment, and, if so advised, they had plenty of time in which to replace the three bad bales.

But since the buyers did not so state, but preferred to repudiate the whole contract, the question arises whether when the time has expired and there is no further question of replacement, the buyers can for the first time complain that three bales were defective. This proposition is precisely what Mathew, L. J., stigmatizes as unbusinesslike and unreasonable in the leading case on the subject, *Braithwaite* v. *Foreign Hardwood Company*[1]. This case has been canvassed in the English rulings, but as regards our Court its principle is clearly affirmed in *Rayulu Aiyar* v. *Kuppu Aiyar & Sons*[2] and *Nannier* v. *Rayalu Iyer*[3]

1. (1905) 2 K. B. 543 at 554.
2. (1924) 49 M. L. J. 1.
3. (1925) I. L. R. 49 Mad. 781.

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and the following passage at p. 551 shows how closely it runs on all fours with our present case:

"After there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment; but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract, and refused to be bound by it."

In the opinion of Collins, M. R., "that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which presumably he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not willing and ready to perform the conditions precedent devolving upon him".

Commenting upon this decision in *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Company*[1] Lord Sumner says:

" Furthermore it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right."

Therefore, since the sellers have proved that they duly tendered these 9 bales, we do not find that it is open to the buyers to raise the belated plea that three of the bales were not according to the contract which they had preferred entirely to repudiate.

But as regards the 23 bales there was no tender at all. It is clear that the sellers did not accept the repudiation of the contract, and on 2nd April, 1919, Ex. XIV, they are warning the buyers that " you should also take delivery of the remaining bales (*i. e.*, 23) without delay on payment of the amount when and as they are received," but as a matter of fact they never did tender, and there was never any rejection after tender as with the 9 bales.

It was argued for the sellers that this contract though by instalments was indivisible and that a repudiation of one instalment was a repudiation of the whole so as to absolve the sellers from the obligation to tender the twenty-three bales.

The answer to this is that as stated in S. 31 (2) of the English Sale of Goods Act the question of indivisibility is a

1. (1923) A. C. 48 at 71.

matter of fact in each case and as will later appear the sellers themselves clearly treated the contract as divisible.

In these circumstances the law seems clear as laid down in *Frost* v. *Knight*[1]:

"The promisee may treat the notice of intention (to renounce) as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Cf. Leake on Contracts, Ed. 8, p. 675. The sellers were still under the obligation of tendering, as they themselves admitted in their letter of 2nd April, 1919, Ex. XIV, and in the "Note" to their plaint in O. S. No. 70 of 1919, Madura Sub-Court, which is an exhibit in this case.

The sellers at that time instead of bringing their suit regarding the twenty-three bales at once as they might have done elected to keep the contract alive so far as the twenty-three were concerned thereby preserving the mutual obligations of the parties intact.

One of these obligations was that they the sellers should tender the goods; and since they never did tender, they cannot now be heard to say that they can retain the buyers' earnest money on account of the 23 bales.

For the above reasons we agree with the Lower Courts in respect of the 9 bales, but allow the appeal in regard to the 23 bales; the advances for which must be returned with interest at 9 per cent. from date of demand. Proportionate costs throughout.

S. R. *Appeal allowed in part.*

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1. (1872) L. R. 7 Ex. 111.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE CORNISH.

Kottamasu Venkataratnam .. *Appellant* (2nd Plaintiff)*

v.

Polisetty Butchayya and others .. *Respondents (Defendants and 2nd defendant's representatives).*

Venkataratnam v. Butchayya.

Stamp Act (II of 1899), S. 2 (22)—"Promissory note"—What constitutes—Agreement to repay money withdrawn from Court—Test for determining nature of document.

S. 2 (22) of the Stamp Act extends the definition of "promissory note" as given in the Negotiable Instruments Act in certain ways but it does not do away with one essential characteristic of a promissory note that it must contain a promise to pay to some person or persons or to their order or to the bearer of the note. A document was in the following terms: "A sum of Rs. 17,000 has been in Civil Court deposited to your credit to the account of the suit To-day I have withdrawn that amount on furnishing security. We shall repay to you the said sum together with interest thereon at the rate of 6 per cent. per annum from this date as soon as you settle the High Court affairs. If it shall be ordered by the Court that the aforesaid amount should be deposited in Court, we shall deposit only the said amount in Court and pay to you the amount of interest accruing thereon till that date."

Held, that the document was not a promissory note within the meaning of S. 2 (22) of the Stamp Act.

Per *Cornish, J.*—In deciding whether a document is a promissory note the question is what is the dominant or the substantial effect of the instrument. And in the determination of the question two tests are applicable, namely, whether it was the intention of the parties that the instrument should be a promissory note, and whether the document was a promissory note in the common acceptation of the term by businessmen.

Mortgage Insurance Corporation v. *Commissioners of Inland Revenue*, (1887) 20 Q. B. D. 645, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in O. S. No. 113 of 1927.

Ch. Raghava Rao for appellant.

G. Lakshmanna for respondents.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—The learned Subordinate Judge has not thought it necessary to try this suit in full. He dismissed it as a result of his finding on issue 5, which he took up as a preliminary issue. That issue is:

"Whether the suit document is a promissory note under the Stamp Act as contended by the defendants 3 and 4 and is inadmissible in evidence."

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*Appeal No. 293 of 1929. 1st November, 1932.

The learned Subordinate Judge has found that the document is a promissory note, and, as it has not been stamped, he has found it inadmissible in evidence. He has therefore dismissed the suit.

Plaintiff 2 has appealed, contending that the document on which the Plaintiffs sued is not a promissory note. The crucial part of the document appears to me to be contained in two sentences: "We shall pay to you the said sum together with interest thereon at the rate of 6 *per cent. per annum* from this date as soon as you settled the High Court affair. If it shall be ordered by the Court that the aforesaid amount should be deposited in Court, we shall deposit only the said amount in Court and pay to you the amount of interest accruing thereon till that date." I do not think it can be reasonably contended that a document so framed is a promissory note within S. 4 of the Negotiable Instruments Act. It is clear that it does not contain an unconditional promise to pay the amount in question to the payees or to their order or to the bearer of the document. The promise is to pay the amount to the payees unless the Court directs that the amount shall be deposited in Court.

But it is contended for the Defendants that for the purpose of the Stamp Act "promissory note" includes more than that expression does as defined in the Negotiable Instruments Act. That is so. S. 2 (22) of the Stamp Act runs:

"'Promissory note' means a promissory note as defined by the Negotiable Instruments Act, 1881; it also includes a note promising the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen."

It is contended for the Defendants that this document in question, though not a promissory note under the Negotiable Instruments Act, is a promissory note as the meaning of that term has been extended by S. 2 (22) of the Stamp Act, because the executants promise to pay the amount to the payees upon a contingency which may or may not happen. But if we examine the language of the document carefully, I think it becomes clear that they promised to pay the amount to the payees, not if something happened or did not happen, but to pay to them unless something happened, unless the Court directed that the amount be deposited in Court. Grammatically I do not think that this document, properly interpreted, comes within the extended definition of "promissory note" as given in the Stamp Act.

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But there is something more than mere grammar in the matter, as Mr. Raghava Rao has urged. S. 2 (22) of the Stamp Act extends the definition of "promissory note" as given in the Negotiable Instruments Act in the ways I have mentioned when quoting the sub-section in full. But it does not do away with, or in any way affect, one essential characteristic of a promissory note, that it must contain a promise to pay to some person or persons or to their order or to the bearer of the note. Here, quite apart from any question of a contingency happening or not happening, the promise is to pay in one event to the payees, in the other event to deposit the money in Court. Mr. Lakshmanna for the Defendants has contended that in the circumstances payment into Court to the credit of a particular suit, as is provided in one event in this document, would be the same thing as payment to the payees, because the payees were judgment-debtors, who were under liability in certain circumstances to pay the amount to the credit of a suit in which a decree had been made against them. In effect his argument is that in one event the executants had promised to pay the amount to the payees, in the other event to pay it into Court to the credit of a suit on their behalf, because it was money which in that event they would be liable to pay. It is quite true that the principal money concerned in this suit was on the pleadings money drawn by the Plaintiffs from Court on security being given that they would, if they lost a certain case in the High Court, pay it back into Court; and in that sense, if in the one event the executants of the document in question here had to deposit the amount in Court, they would be paying it into Court on behalf of the Plaintiffs (judgment-debtors). But it would be a very extraordinary and to my mind unpermissible extension of the definition of a promissory note in S. 4 of the Negotiable Instruments Act to say that it is the same thing for the purpose of that definition to promise to pay an amount to a person or to his order and to promise to pay that amount on his behalf to some third person on the order of that third person, though it may be equally advantageous to the payee if either course is adopted. To pay money to a third party on behalf of the payee but on the third party's order cannot be treated as the same thing as, or equivalent to, payment to the payee or to his order which is the promise necessary in any note not payable to the bearer or to the payee only in order to bring it within the definition in S. 4

of the Negotiable Instruments Act. That element of a promissory note has not been extended or altered in any way by the extended definition of a promissory note given in S. 2 (22) of the Stamp Act. In my opinion this document with which we are concerned is not a promissory note either within the meaning of the Negotiable Instruments Act or within the meaning of the Stamp Act. For these reasons, apart from other consideration in my opinion the finding of the learned Subordinate Judge was wrong.

I may mention that the learned Subordinate Judge thought that S. 13 (2) of the Negotiable Instruments Act might be applicable to this case treating the document as one containing a promise to pay to alternative payees. But it is unnecessary to discuss that aspect of the matter beyond saying that his opinion is clearly wrong and that it has not been contended by Mr. Lakshmanna that that section is really applicable to this case. In my opinion therefore the decree of the learned Subordinate Judge should be set aside and the suit should be remanded to him for fresh trial, the Court-fee paid by the Appellant being refunded to him. Costs of this appeal should abide and follow the result.

Cornish, J.

Cornish, J.—I agree. In deciding whether the document is a promissory note, the question, as observed by Pollock, B. in *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue*[1], is what is the dominant, the substantial effect of the instrument. And in the determination of the question, two tests are applicable: (1) was it the intention of the parties that the instrument should be a promissory note, and (2) is the document a promissory note in the commnn acceptation of the term by businessmen? Taking first the second of these tests, I find it difficult to believe that the suit document would be regarded by businessmen as a promissory note. It is addressed to the plaintiffs and purports to be written by two of the defendants and to be signed by all the three defendants. It is in these terms:—"A sum of Rs. 17,000 has been in Civil Court deposited to your credit to the account of O. S. No. 31 of 1921 on the file of the Additional Sub-Court. To-day I have withdrawn that amount on furnishing security of our own property. We shall repay to you the said sum together with interest thereon at the rate of six per cent. per annum from this date as soon as

1. (1887) 20 Q. B. D 645.

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you settle the High Court affairs. If it shall be ordered by the Court that the aforesaid amount should be deposited in Court, we shall deposit only the said amount in Court and pay to you the amount of interest accruing thereon till that date." It is true that the document contains a statement that the defendants would repay the money. But a mere promise to pay is not sufficient to make the document a promissory note, if it appears from the context that the document was not intended to operate as a promissory note. In my opinion, the fair interpretation of the suit document is that it was intended to be a memorandum or recital of an agreement whereby the defendants were to repay the money withdrawn from Court to the plaintiff if he succeeded in his appeal, or to the Court if the Court so directed. I also think that the document fails when tried by the first test. It was neither the plaintiff's case nor the defendant's case on the pleadings that a promissory note was executed. The plaintiff's allegation was that the document in question was an acceptance by the defendants of an offer made by the plaintiff for use of money drawn from Court on which the defendants were to pay him interest. The defendants on their part deny the genuineness of the document, and they deny that they withdrew the money on loan from the plaintiff. Their case was that there was an agreement between the parties that the moneys withdrawn from Court should be lent by defendants for the mutual benefit of both parties. When therefore it was nobody's case that a promissory note was intended to be executed and when the document itself did not clearly reveal any such intention, I think the Lower Court was not justified in holding that the document was a promissory note.

B. V. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE CORNISH.

Ammathayarammal .. *Appellant** (*2nd Defendant*)

v.

The Official Assignee of Madras.. *Respondent* (*Plaintiff*).

Ammathayarammal v. The Official Assignee of Madras.

Evidence Act (I of 1872), Ss. 154 and 155—Hostile witness—Cross-examination by party summoning witness—Permission of Court if necessary—Witness discredited on one point—Evidence whether can be taken into account on another point.

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*O. S. Appeal No. 47 of 1930. 3rd March, 1932.

Before a party calling a witness can cross-examine him it is not necessary that the witness should first of all be declared hostile. In this respect S. 154 of the Indian Evidence Act gives an unqualified discretion to the Judge quite apart from any question of the hostility or otherwise of the witness.

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Baikuntha Nath Chattoraj v. *Prasannamoyi Debya*, (1922) 44 M. L. J. 699 (P.C.) and *Praphulla Kumar Sarkar* v. *Emperor*, (1931) I. L. R. 58 Cal. 1404 (F.B.), referred to.

It is, however, necessary before the procedure of S. 154 can be adopted either for permission of the Court to be obtained or for it to be given by the Court without its being sought. Such permission should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him.

Where a witness turns hostile and is cross-examined by the party calling him the evidence of such a witness need not be rejected *in toto*. It is a question for the Judge to decide whether in spite of the witness having been discredited on one point his testimony may be considered on another.

Praphulla Kumar Sarkar v. *Emperor*, (1931) I.L.R. 58 Cal. 1404 (F.B.), relied on.

On appeal from the judgment of the Hon'ble Mr. Justice Waller, dated 1st May, 1930, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 395 of 1929.

T. R. Venkatarama Sastri and *K. Narasimha Aiyar* for appellant.

Nugent Grant instructed by *V. Varadaraja Mudaliar* for respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The 1st defendant in the suit under appeal is an insolvent and the 2nd defendant is his wife. The Official Assignee claimed in the suit a declaration that three houses, the title deeds of which stand in the name of the insolvent's wife, the 2nd defendant, were in reality the property of the insolvent who paid for them. The defendants on the other hand contended that the insolvent's wife was the actual buyer and that all the money required came from her pocket with the exception of 1/6th of the price of one of the houses. Beasley, C.J.

It is not necessary at this stage to go into any of the facts of the case because an objection has been taken, which we are dealing with as a preliminary objection, to certain procedure adopted at the trial. The Official Assignee called the insolvent, the 1st defendant in the suit, in support of his case. Whilst he was under examination-in-chief, Mr. Grant who appeared for the Official Assignee put a number of questions to the witness

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of a cross-examination nature. Objection is taken that Mr. Grant cross-examined his own witness. This, it is contended by the appellant, he was not entitled to do unless (1) the witness first showed himself to be hostile, and (2) leave of the Court to put such questions to him had been obtained. It is objected, first, that the witness did not show himself by his demeanour to be hostile; and, secondly, if he did, the consent of the Court to cross-examine him was never obtained. There is nothing on the record of evidence to show that any submission was ever made to the Trial Judge that the witness was hostile and that leave was sought to cross-examine him. Mr. Grant quite fairly says that he has no recollection of ever having made any such submission. It is equally clear that no objection to the procedure adopted by the learned Counsel for the Official Assignee was taken by his opponent. From the concluding passage in the learned Trial Judge's judgment it would appear that Mr. Srinivasa Aiyangar who appeared for the defendants in the course of his argument condemned the procedure already referred to. The learned Trial Judge deals with Mr. Srinivasa Aiyangar's argument on this point and states as follows :—

"I am aware that, as between two ordinary litigants, such a method of procedure has been strongly condemned by the Judicial Committee. The Official Assignee stands in a different and frequently a very embarrassing position. He represents the estate of the insolvent, who is usually colluding with transferees against his creditors. The insolvent, in such a case, has to be made a party. The Official Assignee must examine him as a witness, for there are certain things that only he can speak to, but it would be absurd to treat him as having been put forward as a witness of truth, by all of whose statements the Official Assignee is bound. In this case the insolvent had to be examined to admit the correctness of his banking account and the fact that all the money for the houses came out of it. Beyond that, everything he wanted to say was in favour of his wife and I can see nothing improper in allowing the Official Assignee to cross-examine him in order to show that his evidence, in other respects, was not to be accepted and to elicit admissions from him that were inconsistent with his support of his wife."

What, in my view, is to be understood by these observations is (1) that no objection was taken to Mr. Grant cross-examining his own witness by Mr. Srinivasa Aiyangar while the witness was in witness-box, and (2) that the Trial Judge did not interfere but allowed the cross-examination to go on. What is quite clear is that, if Mr. Srinivasa Aiyangar had objected to this procedure or Mr. Grant had asked for permission to adopt it, Waller, J. would have disallowed the objection and allowed Mr. Grant to cross-examine the witness for the reasons he has stated.

Three questions arise here: (1) Before the party calling the witness can cross-examine him, is it necessary that the witness should first of all be declared to be hostile, or can such questions be allowed by the Court to be asked even though the witness does not show himself to be hostile? (2) Is it necessary that, before they are asked, the leave of the Court should be asked for and obtained? and (3) What is the effect of such an examination of the witness on the testimony of that witness; should the whole of his evidence be discarded or is it open to the Court to accept some of it and discard the rest?

The meaning of S. 154 of the Indian Evidence Act has to be considered. That provides that:

> "The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

For the respondent, the Official Assignee, it is argued that that section gives the Court an unfettered discretion and that the exercise of that discretion is not therefore dependent upon the hostile demeanour of the witness; and furthermore it is argued that it is not necessary that the leave of the Court to put such questions to the witness should be obtained because the words used are "the Court may . . . permit . . ." It is argued that this permission need not be expressed in words and that, if no objection is raised by the opposite side and the Court does not interfere with the cross-examination, the permission of the Court is to be implied. It is further argued that the effect of a party cross-examining his own witness is not to cause general discredit to be cast upon the witness and that it is open to the Court to attach such weight to the evidence of the witness so dealt with as it thinks right.

With regard to the first question raised, it must be observed that in practically all the cases cited the witness had been shown to be a hostile witness so that no question arose as to the limits of the Court's discretion. There are, however, two cases which actually do consider this question and one of them is a decision by which we are bound. That is the decision of the Privy Council in *Baikuntha Nath Chattoraj* v. *Prasannamoyi Debya*[1]. The judgment of the Judicial Committee was

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1. (1922) 44 M. L. J. 699 (P. C.).

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delivered by Sir Lawrence Jenkins and on page 701 he says:

"Nagendra Nath Ghose does not support the proponent's case, for in his examination-in-chief he declared that he did not know whether Mandakini executed any will, and that it was to a blank paper that he put his signature at the request of Ram Lal Gosain. An application was therefore made to the District Judge to declare the witness hostile and to allow the proponent to cross-examine him This is a position for which provision is made by S. 154 of the Evidence Act, which says nothing as to declaring a witness hostile but provides that the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. One of the Appeal Court's adverse comments on the Trial Judge's conduct of the case is that cross-examination of this witness was improperly disallowed. No such objection was made in the grounds of appeal to the High Court, and it would seem as though this comment must have been made without the Court's attention being drawn to that portion of the order sheet in which the District Judge remarks, as the record of the deposition indicates, that the witness was virtually cross-examined, though the Judge in fact did not think he had turned hostile."

It is this case which supports the following view expressed on page 974 of the 8th Edition of Woodroffe and Ameer Ali on Evidence:

"It can, therefore, be hardly said in this state of the authorities, especially in India where the words of Ss. 154 and 155 are alone to be considered that it is a settled rule that it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment. The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition; and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court."

The other case is *Praphulla Kumar Sarkar* v. *Emperor*[1]. This was a decision of a Full Bench of five Judges. The facts of the case are that one of the prosecution witnesses was declared hostile and permission was given to the Public Prosecutor to cross-examine him. In his charge to the jury the Judge said:

"Maniruddin has deposed in favour of the defence story. This witness has been declared 'hostile' and cross-examined by the prosecution. His evidence has, therefore, to be excluded from your consideration."

I shall refer to this case again when I come to deal with the question whether such testimony has to be excluded from the consideration of the Court. I have referred to this case, however, because of the observations of the Full Bench upon the meaning of S. 154 of the Evidence Act. On page 1424 Rankin, C. J., says:

"Now it is true that in *Coles* v. *Coles*[2], and it may be in other cases, a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good definition of a hostile witness and the Indian Evidence Act is most careful in S. 154 not to restrict the right of 'cross-examination' even by committing itself to the word 'hostile'."

1. (1931) I. L. R. 58 Cal. 1404 (F. B.).
2. (1866) L. R. 1 P. & D. 70.

On page 1433 Buckland, J., says:

"As a practical matter, therefore, S. 154 refers exclusively to cross-examination of a witness by the party calling him. We are not asked to state the circumstances in which the Court may exercise its discretion in favour of the party seeking to cross-examine, and indeed it would be impossible to formulate any comprehensive rule. One observation, however, is permissible. The object of calling a witness is to elicit the facts and if the facts to be elicited are such as ought to be elicited from a witness, and if this cannot be elicited without cross-examining him, it would be difficult to say that the discretion was wrongly exercised."

In this case the judgment of the Judicial Committee in *Baikuntha Nath Chattoraj* v. *Prasannamoyi Debya*[1] is not referred to, but the same view of the scope of S. 154 of the Evidence Act is taken both by Rankin, C. J., and Buckland, J.

In England the law is different upon the point. The Common Law Procedure Act of 1854 settled what had been the subject of varying decisions for many years by providing that

"a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence or by the leave of the Judge, prove that he has made at other times a statement inconsistent with the present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

In England, therefore, the exercise of the discretion of the Court is conditional on the adverse demeanour of the witness, whereas S. 154 of the Indian Evidence Act gives an unqualified discretion to the Judge apart from any question of the hostility or otherwise of the witness. In the opinion of the Referring Judges in *Praphulla Kumar Sarkar* v. *Emperor*[2] the reason why the Court in India is given a much wider discretion than in England is in all probability to avoid the conflict which had existed in England over the words "hostile" and "adverse". The first question raised must, in my view, be answered in the negative.

I now turn to the consideration of the question as to whether permission of the Court must be asked for. Upon this point there is an entire absence of authority which is not at all surprising. Instances where the procedure apparently adopted in this case, namely, the cross-examination of the party's own witness without the leave of the Court being obtained and without objection made by the opposite party and without the

1. (1922) 44 M. L. J. 699 (P. C.).
2. (1931) I. L. R. 58 Cal. 1404 (F. B.).

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express approval of the Court, must indeed be rare. In every case to which reference has been made upon the questions under consideration, so far I am able to see, the leave of the Court to cross-examine the witness had either been granted or refused. In the case under appeal it would seem that the learned Trial Judge assumed from the very nature of the position in which the insolvent stood towards the Official Assignee that the witness was bound to be hostile, a perfectly reasonable assumption; but it is extremely doubtful whether the law in England allows a party to cross-examine a witness for that reason only and indeed there are decisions to the contrary such as *Price* v. *Manning*[1]. In that case it was held that a party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the Judge and that whether the witness is a litigant or not, it is a matter of discretion in the Judge whether he shows himself so hostile as to justify his cross-examination by the party calling him. In this case, Cotton, Fry, and Lopes, L. JJ., in effect overruled the decision of Best, C. J. in *Clarke* v. *Saffery*[2], where Best, C. J., said:

> "There is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the Judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may, as a matter of right, cross-examine him."

Reported on page 737 of the same report there is the case of *Bastin* v. *Carew* where a similar objection was taken, and a cross-examination of an adverse witness allowed. Abbot, C. J., said:

> "I mean to decide this and no further, that in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice."

Price v. *Manning*[1] at any rate states that the rule is that it is a matter of discretion of the presiding Judge whether the witness has shown himself so hostile as to justify his cross-examination by the party calling him. This decision and S. 22 of the Common Law Procedure Act of 1854 seem to me to show that, even where a party puts his opponent into the witness-box,

1. (1889) 42 Ch. D. 372.
2. (1824) 27 R. R. 736: 171 E. R. 966.

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the Court will only exercise its discretion and allow him to be cross-examined if he shows himself to be hostile. Although S. 154 of the Indian Evidence Act gives the Court an unfettered discretion to allow cross-examination of a witness by the party calling him, in my opinion, it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross-examination. That section does not, in my opinion, entitle any party for instance to say "I propose to call my opponent and cross-examine him" and the Court to allow such cross-examination without anything more. It seems to me that the scheme of the section is that something more than the mere position in which the witness stands to the party calling him is required before the Court can exercise its discretion. In my opinion, therefore, it is necessary before the procedure of S. 154 can be adopted either for the permission of the Court to be obtained or for it to be given by the Court without its being sought. In this case, as already stated, it must be taken that no such permission was sought nor was it in words given. But Mr. Grant argues that all that the section requires is tacit permission and that, if the Court does not interfere, it must be taken to have assented to that procedure. He contrasts the word "permit" in S. 154 with the word "consent" in S. 155. His contention is that the two words are used in a different sense and that the consent of the Court required in the latter section must be given as a result of a request made to it, whereas the use of the word "permit" in the former section shows that even a tacit consent is intended. There is much force in this argument because the use of the word "permit" in one section and the word "consent" in the next section makes it probable that it was not intended that these words were to have the same meaning. "Consent" seems to me to imply that it is to be given in consequence of a request made, whereas "permission" need not necessarily follow a request. This, however, does not entirely solve the difficulty because we have still to consider whether it is necessary for the Court to express its permission in words. In my view, it is intended by S. 154 that such a permission should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him. But there is another section of the Indian Evidence Act to be con-

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sidered in this connection and that is S. 142. It is contended by Mr. Grant that, quite apart from S. 154, S. 142 allows a cross-examination by a party of his own witness during that witness's examination-in-chief without the permission of the Court if no objection is taken to it by the adverse party. That section is as follows:—

> "Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved."

In my view, this section is intended to provide for cases different to those contemplated by S. 154. S. 142 refers merely to leading questions; S. 154 refers to questions which might be put in cross-examination by the adverse party. A question put in a leading form is not necessarily tantamount to cross-examination, whereas most questions in cross-examination are leading questions. The distinction between the object of these two sections, to my mind, is that S. 154 provides for the cross-examination of the witness by the adverse party for the purpose of contradicting answers given by the witness or to test the witness's veracity or to drag the truth from him. S. 142, to my mind, clearly does not deal with such a case. It merely deals with leading questions as defined by S. 141, *viz.*, questions suggesting the answer which the person putting them wishes or expects to receive. It cannot be imagined that the legislature had in view any questions to which it is obvious objection must be taken by the adverse party. I do not think that S. 142 assists the respondent's argument. In my opinion, the procedure adopted in this case was not warranted by S. 154 of the Evidence Act, because Waller, J. did not signify his permission at any time during the cross-examination because I do not think that S. 154 means tacit permission. But it is clear that, had permission been formally asked for, he would have granted it, and, as no objection was taken to that procedure by the appellant's counsel and was only taken after all the evidence had been given during the course of the argument, it is now too late to allow this objection which, had it been taken during the cross-examination, would have been overruled by the learned Trial Judge.

I have now to consider whether the whole of the evidence of the witness has to be rejected or not. Reliance is placed by

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the appellant on *Faulkner* v. *Brine*[1]. The head-note of that case is as follows:—

" The defendant's counsel stating, after calling and examining a witness, that he had given another and materially different account of the transaction to the defendant's attorney, the Judge allowed the witness to be asked if they were so, and to be dealt with as adverse, under the Common Law Procedure Act, 1854, S. 23, but only with a view to discredit him generally, and this it will not do if it is not utterly inconsistent with his sworn evidence."

The case was tried by Lord Campbell, C. J., who allowed the question to be put stating

" It must be understood that it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony. If that which is suggested shall be elicited it will show that he is not trustworthy at all."

In *Alexander* v. *Gibson*[2] Lord Ellenborough says:

" If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed. But I know of no rule of law by which the truth is on such an occasion to be shut out, and justice is to be perverted In *Lowe* v. *Jolliffe*[3], which turned on the validity of a will, all the attesting witnesses swore to the insanity of the testator when the will was executed; but they were contradicted by other evidence, and the will was established. The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated."

Alexander v. *Gibson*[2] was referred to in *Panchanan Gogai* v. *Emperor*[4] to support the position that, where a witness turns hostile and is cross-examined by the party calling him, the evidence of such a witness cannot in part be relied upon and the rest of it discarded or rejected. It is there pointed out that *Alexander* v. *Gibson*[2] has been followed ever since 1811 and that in only one case, *Bradley* v. *Ricardo*[5], it was not followed. But in *Bradley* v. *Ricardo*[5], however, it was held that where a party, being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, to be repudiated by the Judge, and *Alexander* v. *Gibson*[2] was referred to. The case was heard in the Common Pleas by Tindal, C. J., Gaselee, Bosanquet and Alderson, JJ., whose judgments are very fully set out by the referring Judges

1. (1858) 1 F. & F. 254: 175 E. R. 715.
2. (1811) 2 Camp 555: 170 E. R 1250.
3. (1762) 1 Bl. W. 365: 96 E. R. 204.
4. (1930) I. L. R. 57 Cal. 1266. 5. (1831) 131 E. R. 321: 8 Bing. 57.

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in their order of reference to the Full Bench in *Praphulla Kumar Sarkar* v. *Emperor*[1]. Tindal, C. J., stated:

"The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case by adducing general evidence to his discredit; but I have never heard it said that, when surprised by a statement contrary to the fact, he may not call another witness to show how the fact really is."

In the opinion of Gaselee, J., *Alexander* v. *Gibson*[2] went too far and he disagreed with Lord Ellenborough. Bosanquet, J., stated that the practice had always been contrary to that adopted in *Alexander* v. *Gibson*[2] and Alderson, J., dissented from Lord Ellenborough and also stated that the case of *Lowe* v. *Jolliffe*[3] referred to by Lord Ellenborough in his judgment established the contrary of the proposition for which it was cited. I do not think that *Alexander* v. *Gibson*[2] or *Faulkner* v. *Brine*[4] can be relied upon by the appellant. With regard to the latter case, as Rankin, C. J., points out in *Praphulla Kumar Sarkar* v. *Emperor*[1], Lord Campbell is not reported to have told the jury that, because he had allowed the questions to be put, the defendant could not rely at all upon the evidence of the witness nor that the cross-examination of a hostile witness by permission of the Court must always be cross-examination to destroy the general credit of the witness, but that his observation was a common sense observation for the benefit of the jury and as a warning to counsel of the risk he ran. In *Praphulla Kumar Sarkar* v. *Emperor*[1] this question has been very fully dealt with by a Full Bench of five Judges of that Court. I have already referred to this case for another purpose. It was there held that the fact that a witness is dealt with under S. 154 of the Indian Evidence Act, even when under that section he is cross-examined as to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence or that the party who called and cross-examined him or any other party can take no advantage from any part of his evidence and that there is no rule of law that, if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. I entirely agree with the decision in this case and with the reasoning in the judgments of Rankin, C. J. and Buckland, J. It is in all cases a

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1. (1931) I. L. R. 58 C. 1404 at 1427 and 1428 (F. B.).
2. (1811) 2 Camp. 555: 170 E. R. 1250.
3. (1762) 1 Bl. W. 365: 96 E. R. 204.
4. (1858) 1 F. & F. 254: 175 E. R. 715.

question for the jury or for the Judge in a civil case to decide what weight is to be given to the testimony of a witness so dealt with and I cannot accede to the contention put forward by the appellant that a different principle is to be applied in such matters when the testimony is being considered by a Judge alone. In one case the jury are the judges of fact and in the other the Judge alone is, and it is for the jury in the one case and the Judge in the other to attach such weight as is right to that evidence. In my opinion, therefore, Waller, J., was entitled to accept or reject such parts of the evidence of the 1st defendant as he did, although I do not agree with the procedure allowed by Waller, J., in this case. Whatever may be the reasons for the exercise of its discretion by the Court under S. 154, first of all to obtain the sanction of the Court to cross-examine the witness is in accordance with the general practice and that practice in my opinion ought always to be followed although S. 154 may not make such procedure imperative; but when the Court has exercised its discretion it ought not to be interfered with by the Appellate Court.

Cornish, J.—I am of the same opinion. The learned Trial Judge says at the close of his judgment that he allowed the witness to be cross-examined, and he gives as his reason that the witness was endeavouring by his evidence to help the case of his wife, the opposite party. In other words, the learned Judge appears to have thought that the witness had shown himself to be adverse to the party who called him. But nowhere does it appear that permission to cross-examine the witness on that ground was actually given. There is no doubt that the correct procedure when a party is desirous of cross-examining his own witness it is for him to formally ask for and obtain the Court's permission. The expediency at least of this course is clear; for, unless the Court is given the opportunity of considering whether on the material before it the cross-examination should be permitted, how is it to exercise a discretion? And a cross-examination which has taken place without it appearing that the Court had considered whether it should be permitted would be altogether irregular. Mr. Grant has contrasted the word "permit" in S. 154 with the word "consent" in S. 155, and contended that permission means no more than sufferance, so that it would be sufficient if the Court signified its permission by acquiescence. I do not think

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it could as a matter of course be assumed simply because it appeared from the record that a witness's examination-in-chief has developed into cross-examination without objection from the Court or opposite party that the Court had exercised its discretion in permitting the cross-examination. It must somehow be shown that the Court did in fact exercise its discretion in the matter: in the present case it appears so from the judgment.

A considerable argument was addressed to us on the scope of S. 154. The section differs from the corresponding provision in the English Act, 28 and 29 Vic., c. 18, which makes it a condition for leave to cross-examine that "the witness in the opinion of the Judge prove adverse". As pointed out by their Lordships of the Judicial Committee in *Baikuntha Nath Chattoraj* v. *Prasannamoyi Debya*[1] S. 154 says nothing about a witness being hostile. It seems to me undesirable, as well as unnecessary, to attempt to define the limits within which the Court's discretion can be exercised under S. 154 when the section itself imposes none. But this much may be said with reference to the particular case before us; that a party who chooses to call his opponent as a witness, or who may by force of circumstances be compelled to take this course, as apparently the Official Assignee was here, in order to prove his case, does not on that account become entitled to treat his witness as hostile and to cross-examine him. The Court must in its discretion determine whether cross-examination of the witness shall be permitted. That was the rule laid down by the Court of Appeal in *Price* v. *Manning*[2], and it is equally applicable to S. 154: see *Luchiram Motilal Boid* v. *Radha Charan Poddar*[3].

The cross-examination of the 1st defendant having been permitted by the Court, there remains the question how far is his credit affected. Mr. Venkatarama Sastri's argument, that the cross-examination must be taken to discredit generally the evidence of the witness for the plaintiff, the Official Assignee, is founded upon the observations of Lord Campbell in *Faulkner* v. *Brine*[4], which have been interpreted in two cases in the Calcutta High Court, *Khijiruddin Sonar* v. *Emperor*[5] and

1. (1922) 44 M.L.J. 699 (P. C.). 2. (1889) 42 Ch. D. 372.
3. (1921) I. L. R. 49 Cal. 93.
4. (1858) 1 F. & F. 254: 175 E. R. 715.
5. (1925) I. L. R. 53 Cal. 372.

Panchanan Gogai v. *Emperor*[1] as authority for the proposition for which the learned Advocate has contended. This is not the view accepted in *Emperor* v. *Jehangir Ardeshir Cama*[2] and in *Sohrai Sao* v. *King-Emperor*[3] and moreover in *Praphulla Kumar Sarkar* v. *Emperor*[4]. Rankin, C. J., expressed the opinion that Lord Campbell's words should not be understood as meaning that the cross-examination of a witness as adverse must always destroy the general credit of the witness. This consequence, it is to be observed, does not flow from calling another witness to contradict what the witness has said: vide *Bradley* v. *Ricardo*[5]. In that case it was said by Bosanquet, J.:

> "A party is often compelled to call an adverse witness; and if he, on cross-examination or otherwise, makes statements inconsistent with fact, another witness may be called to contradict him; and there is no instance of a Judge having been called upon in such a case to strike out the rest of his evidence."

There seems to me no reason why different considerations should govern the case of a witness cross-examined by the party who has called him. It is not an implication that a party when he cross-examines a witness thereby intends to discredit his evidence *in toto*; the cross-examination may be directed only to overthrowing certain parts of his evidence; and a Court or a jury is not bound to entirely disbelieve a witness because a portion of his testimony has been discredited in cross-examination. In my opinion, therefore, the cross-examination of the 1st defendant is not to be taken as a total repudiation of his evidence by the Official Assignee who called him as a witness.

[The above appeal again came on for hearing on 3rd March, 1932 and their Lordships agreed with the Trial Court in holding that the several transactions were *benami* and must be set aside.]

B. V. V. *Appeal dismissed.*

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1. (1930) I. L. R. 57 Cal. 1266.
2. (1927) 29 Bom. L. R. 996 at 1005.
3. (1929) I. L. R. 9 Pat. 474 at 484.
4. (1931) I. L. R. 58 Cal. 1404 at 1427 (F. B.).
5. (1831) 131 E. R. 321: 8 Bing. 57.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD THANKERTON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Radhakisson Gopikisson, a firm (now represented by Juthalal Motilal, Receiver) .. *Appellants**

v.

Balmukund Ramchandra, a firm .. *Respondents.*

P. C.

Radhakisson Gopikisson *v.* Balmukund Ramchandra.

Bombay Cotton Contracts Act (XIV of 1922), Ss. 3, 4 and 5—Articles of Association and by-laws of the East India Cotton Association—By-law 81—Contracts for purchase or sale of cotton for forward delivery—Arbitration, whether condition precedent to commencement of proceedings—Non-compliance with requirements of by-laws—Validity of contracts.

In a suit for recovery of the balance due in respect of a series of transactions in cotton carried out by the plaintiffs-appellants as commission agents on behalf of the defendants-respondents,

Held, on a construction of the Bombay Cotton Contracts Act (XIV of 1922), Ss. 2, 3, 4 and 5 and the Articles of Association and statutory by-laws of the East India Cotton Association—

(1) that the suit was maintainable, arbitration not being a condition precedent to the commencement of proceedings, and

(2) that the contracts in question not being in the form prescribed by the by-laws, they were rendered void under the provisions of S. 5 of the Act, XIV of 1922, and therefore the suit, based on such contracts, must be dismissed.

Judgment of the High Court, Bombay, on its Appellate Side (I. L. R. 55 Bom. 382) affirmed.

Appeal No. 15 of 1932, by special leave, from a decree, dated the 12th August, 1930, of the High Court, Bombay, Appellate Civil Jurisdiction, affirming (though on different grounds) a decree, dated the 5th November, 1929, of the said High Court, Ordinary Original Civil Jurisdiction.

The appellants-plaintiffs carried on business as commission agents, and in pursuance of respondents-defendants' instructions they entered into various forward transactions in cotton. On the 21st November, 1928, they brought the suit, giving rise to the appeal, to recover Rs. 3,908 being the balance due in respect of these transactions. The Trial Judge held that the contracts satisfied the provisions of by-law 81 of the East India Cotton Association, but that a reference to arbitration was a condition precedent to the institution of the suit, and he dismissed the suit on that ground. The Court of Appeal held that reference to arbitration was not a condition precedent, but that the contracts in suit did not comply with the provisions of by-law 81. In the result, the learned Judges affirmed the decree of the Trial Court dismissing the suit.

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*P. C. Appeal No. 15 of 1932. 15th December, 1932.

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Against the said decree of the High Court, Appellate Civil Jurisdiction, the plaintiffs, by special leave, appealed to His Majesty in Council.

Upjohn, K. C. and *Parikh* for appellants.

M. A. Jinnah for respondents.

15th December, 1932. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—The suit in which the present appeal arises was instituted by the appellants on the 21st November, 1928, in the High Court of Judicature (Original Jurisdiction) at Bombay against the respondents for recovery of the balance due in respect of a series of transactions in cotton carried out by the appellants as commission agents on behalf of the respondents.

Various grounds of defence were put forward by the respondents, but only two of these are involved in the present appeal, *viz.*: (1) that the suit was not maintainable under the provisions of the Bombay Cotton Contracts Act (XIV of 1922) and Art. 96 of the Articles of Association of the East India Cotton Association, Ltd., which were applicable to these transactions and under which arbitration was a condition precedent to any suit in Court, and (2) that the transactions did not comply with the statutory by-laws of the Association and were therefore rendered void by the provisions of the Act.

The Trial Judge (Kemp, J.) on the 5th November, 1929, dismissed the suit, holding that, while there was sufficient compliance with the by-laws, a submission to arbitration was a condition precedent and the suit was not maintainable. On appeal, the learned Judges of the Court of Appeal on the 12th August, 1930, held that arbitration was not a condition precedent, but that the by-laws had not been complied with; they therefore confirmed the decree of the Lower Court, though on a different ground. The present appeal is taken from that judgment.

The appellants carry on business as commission agents at Cawnpore and Bombay; the respondents are merchants at Cawnpore. The balance sued for arises on eight transactions, which began in each case with an order by the respondents on a printed form supplied by the appellants for purchase or sale in Bombay of a number of bales of cotton for forward delivery.

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On receipt of the order the appellants instructed their brokers in Bombay, Messrs. Chimanram Motilal, who executed the order and reported it to the appellants. Subsequently each transaction was closed by a sale or purchase, with a profit or loss arising to the respondents, as the case might be. The initial order in each case stated that the order was to be "subject to the Rules and Regulations of the East India Cotton Association, Limited, is applicable and also subject to the terms and conditions of your contract." Then follow various stipulations. It may be taken that the ungrammatical words "is applicable" mean "so far as applicable". In fact the appellants, who are now Associate Members of the Association, were not so at the time of the initial orders in the case of the three earliest transactions, but their Lordships are not in a position to separate the stages of these transactions, and they will deal with the important questions which arise on the footing that the appellants were at all material times members of the Association. It may be noted that Associate Members must employ a broker to carry out dealings on the Bombay Cotton Exchange and that such broker must be a member of the Association.

The Bombay Cotton Contracts Act of 1922 recites that it is expedient to provide for the regulation and control of transactions in cotton in Bombay and provides so far as is material, as follows:—

"2. In this Act, unless there is anything repugnant in the subject or context—

(a) 'Contract' means a transaction in cotton to be carried out in whole or in part in Bombay;

(c) The 'Association' means the East India Cotton Association, Limited; and

(d) The 'Board' means the Board of Directors of the Association acting through at least a quorum of their number at a meeting of that Board duly called and constituted.

"3. The Board may, subject to the sanction of the Governor in Council, make by-laws for the regulation and control of transactions in cotton:—

(f) prescribing the terms, conditions and incidents of contracts and the forms of such contracts as are in writing;

(g) regulating the making, performance and cancellation of contracts including contracts between a commission agent and his constituent, or between a broker and his constituent, or between a jethawala or muccadum and his constituent, or between a member and a non-member of the Association and providing for the consequences of insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer, and the responsibility of commission agents, muccadums and brokers not parties to such contracts;

(*m*) regulating the course of business between parties to contracts in any capacity whether they be members of the Association or not.

"4. The constitution and administrative machinery set out in the Articles of Association of the Association are declared to be lawful. The said Articles shall not, except with the sanction of the Governor in Council, be altered in respect of—

the number or constitution of Panels, or the representation upon (*a*) Panels, (*b*) the Panels Representative Committees, (*c*) the Representative Committee of the Association, or (*d*) the Board.

"5. Any contract (whether either party thereto is a member of the Association or not) which is entered into after the date on which by-laws under this Act are sanctioned by the Governor in Council and published in the Bombay Government Gazette, and which contravenes any such by-law shall be void."

The first question at issue depends on S. 4 of the Act and on Article 96 of the Articles of Association which provides as follows:—

"*Article* 96.—Whenever any difference arises between Members or Associate Members or Special Associate Members or between one or more of them and another or others who are not Members or Associate Members or Special Associate Members touching or in connection with the cotton trade or any transaction therein it shall be referred to arbitration in such manner as shall be prescribed by the By-laws. And it is hereby expressly declared that the holding of such an arbitration and the obtaining of an award thereunder shall be a condition precedent to the right of any Member or Associate Member or Special Associate Member or non-Member to commence legal proceedings against any other Member or Associate Member or Special Associate Member or non-Member in respect of any such difference as aforesaid and any Member or Associate Member or Special Associate Member or non-Member shall have no right of action against any other Member or Associate Member or Special Associate Member or non-Member except to enforce the award of any such arbitration."

The respondents maintain that the effect of S. 4 is to make Art. 96 binding on non-members as well as members, and that accordingly the present suit is not maintainable, arbitration being a condition precedent to the commencement of proceedings. Their Lordships are unable to construe S. 4 in that sense. In their opinion S. 4 does no more than to declare that the constitution and administrative machinery set out in the Articles are not unlawful, and does not alter the character of the Articles as a domestic contract among the members of the Association. The respondents maintained alternatively that the Articles of Association were included among the "Rules and Regulations" to which the present contracts were expressly made subject by the passage quoted above from the initial orders, but their Lordships read these words as referring to the published by-laws made for the regulation and control of cotton transactions, which the Act makes binding on non-members, and are of opinion that they cannot be taken to refer

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also to the Articles of Association. Their Lordships agree with the conclusion of the learned Judges of the Court of Appeal on this point.

The validity of the contracts between the appellants and the respondents is challenged by the latter on the ground that they contravene by-law 81 of the statutory by-laws, which is in the following terms:—

"81.—Contracts between Agents and their constituents, *e.g.*, between a member and a non-member or between a member acting as an agent and a member acting as his constituent shall be subject to the By-laws and shall be in writing in the form given in the Appendix (pages 67, 68, 69 and 70), provided that to such contracts By-laws 130 to 163 inclusive shall not apply."

"A member whose constituent has agreed in writing to sign the prescribed form of contract and fails or refuses to do so after terms have been arranged shall be treated in all respects as if he had done so and both parties shall have the rights and remedies accorded by these By-laws."

The form in the appendix which is referred to is headed "Official Client's Contract Form" and, in addition to the details of the transaction, contains various terms and conditions as to payment, provision of margins, arbitration, etc.

The appellants maintain, in the first place, that this by-law, so far as it purports to apply to a contract between a commission agent and his constituent, is *ultra vires* of the Association in respect that sub-head (*f*) of S. 3 of the Act which authorises regulation of the Forms of Contracts, only relates to a contract to which a broker is a party, and does not relate to a contract of agency between a commission agent and his constituent. This argument is based on a narrow view of the definition of "contract" in S. 2 and a comparison of sub-heads (*f*) and (*g*) of S. 3. It is argued that the transaction in cotton to be carried out in Bombay relates only to the contract with the broker who deals on the exchange, while the commission agent is employed by his constituent to procure the contract with the broker, the relations between the commission agent and his constituent being merely one of agency and not forming part of the transaction in cotton within the meaning of S. 2 (*a*). It is further argued that, while the definition of contract in S. 2 applies to sub-head (*f*) of S. 3, it is expressly extended in sub-head (*g*) so as to include *inter alia* contracts between a commission agent and his constituent and that by-law 81 and its relative form are alone warranted by sub-head (*f*) of S. 3.

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Their Lordships are unable to accept this construction; in their view the transaction in cotton referred to in the definition of contract covers the whole transaction in cotton, including the part which an intermediary takes in it, and this view is supported by sub-head (*m*) of S. 3, which shows that the whole course of business "between parties to contracts in any capacity whether they be members or not" is to be subject to regulation by by-laws. They are therefore of opinion that by-law 81 and its relative form are *intra vires*.

In the next place, the appellants maintained that by-law 81 and its relative form do not apply to a contract between a commission agent and his constituent. While admitting that the by-law would *prima facie* apply to such a case, they contended that the terms of the form prescribed were quite inapplicable to such a case and could only apply to a contract between a broker and his constituent. It is to be noted that neither this contention nor the preceding contention as to the validity of the by-law appears to have been maintained in either of the Courts below, the only question having been whether the contracts in the present case sufficiently complied with the prescribed form. The Trial Judge held that there was substantial compliance with the form, which was all that was required by the by-law, but a contrary view was taken in the Court of Appeal, where it was held that there must be literal compliance with the form, and that admittedly such compliance was absent in the present contracts. Before their Lordships it was not argued by the appellants that there was even substantial compliance with the form.

Their Lordships are of opinion that the form prescribed is, in its terms, applicable to contracts between a commission agent and his constituent and that the parties in the present case were bound to comply with the by-law and its form. They are unable, however, to agree with the view that the form is a stereotyped one and that literal compliance with it is essential; in their opinion, the contract must contain all the terms and conditions set out in the form in order to comply with it. For instance, in the prescribed form the main terms and conditions are contained in the memorandum of contract (on page 68 of the by-laws) sent by the agent to his constituent, in which the former reports the fulfilling of the order by a purchase or a sale, as the case may be, in Bombay. •If

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identical terms and conditions, instead of being in the memorandum sent by the agent, were contained in the initial order by the constituent, their Lordships are of opinion that there would be *pro tanto* sufficient compliance with the by-law. But that is clearly not found in the present case, for the initial orders are inconsistent with the terms and conditions set out in the prescribed form in at least two respects, *viz.*: (1) as regards the absence of any provision for arbitration and the substitution of provision for the particular Courts in which suits are to be instituted, and (2) a provision that, in the event of a loss on the transaction, the agents' account is to be accepted as correct and to be binding on the constituent in any legal proceeding. It follows that the contracts having failed to comply with the by-laws they are rendered void under the provisions of S. 5 of the Act, and the appellants' cause of action fails.

Their Lordships accordingly will humbly advise His Majesty that the decree of the High Court of Judicature at Bombay, dated the 12th August, 1930, should be affirmed, and the appeal should be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitor for respondents: *H. S. L. Polak.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD WRIGHT, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Naresh Mohan Thakur and others .. *Appellants**

v.

Brijmohan Misra, since deceased, and others .. *Respondents.*

Procedure—Suit for injunction and damages—Evidence on the issue of amount of damages allowed to be reserved till determination of liability—Propriety of.

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In a suit for damages and injunction to restrain the defendants from erecting a dam across a stream to the uninterrupted flow of which the plaintiff claimed to be entitled, the plaintiff was allowed by the Trial Court to reserve his evidence on the issue of the amount of damages till the issue of liability was determined. Ultimately the Trial Judge, finding the issue in the plaintiff's favour, directed the amount of the damages to be thereafter determined. But the Appellate Court rejected *in toto* the plaintiff's claim for

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*P. C. Appeal No. 20 of 1932. 22nd November, 1932.
* Patna Appeals Nos. 47 of 1928 and 20 of 1930.

damages on the ground of insufficiency of evidence and that the plaintiff ought to have proved by proper evidence at the trial the amount of damages suffered by him.

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Held, that the course adopted by the Trial Court was a very usual, proper and convenient course and that the High Court was not justified in dismissing the plaintiffs' claim.

Consolidated Appeals No. 20 of 1932 from a judgment of the High Court, Patna, dated the 5th June, 1928, reversing in part a judgment and decree of the Subordinate Judge of Bhagalpur, dated the 24th July, 1924, and remanding the case with certain directions to the Court of the Subordinate Judge, and from the judgment and decree of the High Court, dated the 24th June, 1930, passed on receipt of the record from the Subordinate Judge's Court after compliance with the said directions.

J. M. Pringle for appellants.—The High Court was wrong in dismissing the plaintiffs' suit for damages on the ground of want of evidence in view of the order of the Trial Judge granting leave to the plaintiffs to reserve their evidence on the issue of damages. A determination on the question of the quantum of damages would only arise on the establishment of the plaintiffs' right to the free and uninterrupted flow of the water of the river, and the reservation of evidence bearing on the question of damages was a reasonable procedure to adopt, and was never objected to by the respondents-defendants.

S. Hyam for respondents.—As evidence on the question of the alleged damages was not concluded in the Trial Court, the defendants were not in a position to establish their defence that the plaintiffs had suffered no damages.

22nd November, 1932. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—This appeal raises only one question, which is a very narrow one, though of considerable importance. The sole matter for determination here is whether the High Court at Patna were right in dismissing the appellants' claim to recover damages from the respondents. The claim was dismissed *in toto*, and the respondents have contended before their Lordships that the order of the High Court dismissing *in toto* the claim for damages was correct. The rest of the order of the High Court is not in any way brought in issue before their Lordships. In all other respects, except as to costs, the High Court affirmed the decree of the Subordinate Judge of Bhagalpur.

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The appellants and the respondents are riparian owners on the river Belasi. The appellants, who were plaintiffs in the action, are the lower riparian owners on that stream, and the respondents are the upper riparian owners.

The claim in the action was that the respondents had erected a dam on their part of the stream, which had the effect of interfering with the flow of the stream down to and through the portion belonging to the appellants and in that way have interfered with their rights as riparian owners and caused them loss or damage. The claim in the action, which is contained in the plaint, raises the issue of fact and claims a declaration that the plaintiffs were entitled to the free and uninterrupted supply of water, and an injunction to restrain the defendants from putting up a dam across the river Belasi, or obstructing the free flow of water in any other manner, and, furthermore, to pass a decree for Rs. 10,350 as damages for the injury suffered by the plaintiffs, and also to pass a decree "for further damage till the removal of the dam and that the amount of actual damage may be ascertained in a subsequent stage of the suit and a decree may be passed for the same on taking requisite Court-fee." That was the prayer in the action, and issues were framed by the Subordinate Judge, of which issues Nos. 13 and 14 are material. Issue No. 13 is: " Did the crops of the plaintiffs suffer on account of the construction of the disputed dam." Issue No. 14 is: "Are the plaintiffs entitled to get any damage from the defendants ? If so, how much?"

The case obviously involved a very long and intricate examination of the facts and involved a very prolonged calling of witnesses. It appears that at the trial twenty-one witnesses were called for the plaintiffs, the appellants, and twenty-six witnesses for the defendants, the respondents. At the end of the evidence of the first witness called by the plaintiffs they filed a petition, which is set out in the record, in these terms: "Petition filed by plaintiffs praying that the evidence regarding loss and damages be allowed to be reserved for the present and till after the decree is passed in this suit." On that an order was made on the same date as the petition. The petition shows " that, during the course of the cross-examination of witness No. 1 of the plaintiffs on the matter of the extent of loss and damages sustained by the plaintiffs in consequence of want of water for irrigation and the failure of the crops, it has been suggested

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that it would be convenient to reserve the determination of the said matter at this stage to save loss of time if the plaintiffs be not successful in their suit. That the plaintiffs accordingly humbly pray that the evidence regarding the above be allowed to be reserved for the present and till after the decree is passed in the suit." On that an order was made accordingly, as appears from the record, which, after referring to the petition, adds: "Prayer allowed." That is the only reference to the order, and there is nothing in the record to show that that order was made after it had been objected to on the part of the defendants. It was certainly a most reasonable and proper order to make. It was well within the inherent jurisdiction of the Court in determining how the suit should be conducted, and their Lordships cannot find any trace anywhere that the defendants, the respondents, at the time objected to that order being made. The trial proceeded on the basis of that order. No further evidence as to damage was called; at least, their Lordships have not discovered, and their attention has not been called to any further evidence as to damages. At the close of the prolonged and very complicated trial the Subordinate Judge of Bhagalpur gave judgment. The judgment is very interesting, very long and very complete. He finds that the plaintiffs' claim succeeded. Their Lordships need only refer to the very end of his judgment as being a matter material on this appeal. In para. 11 the judgment proceeds thus: "The 13th issue relates to the crops of the plaintiffs having suffered on account of the construction of the *Bandh*. It has been established by evidence that the villages named in the plaint produce paddy. Paddy must suffer if there is not sufficient water. The crops will therefore suffer if the means of irrigation is stopped." Then paragraph 12 says: "The 14th issue related to damages suffered by plaintiffs. On the side of plaintiffs a large number of sale certificates have been filed to show that the tenants could not pay rent and their holdings were sold for arrears of rent. The Kamat lands will also suffer by want of irrigation, and the Zamindar will also suffer damage in respect of Bhaoli lands. I find, therefore, the plaintiffs have suffered damage and they are entitled to recover the same from the defendants. They cannot, however, get damage as claimed in the plaint without the same being determined. They may get the amount determined by filing the petition, and the amount so determined shall be recoverable

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by them. They are also not allowed costs in this suit on the amount claimed in the plaint, but they will get costs in proportion to the amount determined." The order proceeds to declare: "The right of the plaintiffs to uninterrupted flow of water from the Belasi is declared, and it is further ordered that defendants have no right to put up a dam across the said river so as to stop or diminish the flow of water to the villages lower down." It orders the defendants to remove the dam within a month, and it grants a permanent injunction in the terms prayed for by the plaintiffs. Then it proceeds, and this is the part which is material for the purposes of this appeal: "Plaintiffs are held entitled to recover damages, the amount whereof to be hereafter determined. For the purposes of costs to be assessed at this stage the value of the land is held to be Rs. 9,000, and the costs and damage will be awarded on the same being determined." That is the judgment of the Subordinate Judge. The respondents then appealed to the High Court at Patna, and they lodged a very long memorandum of appeal dealing very minutely with the various facts of the case relating to the course of the river and the obstruction to the river and the flow of water. Of all the heads, amounting to forty-seven, in this lengthy memorandum, their Lordships have only been referred as relevant to the appeal, to head 13, which complains "that the finding of the Court below that plaintiffs' crops suffered by reason of obstruction complained of and they are entitled to damages is not correct." That being the memorandum of appeal lodged by the respondents in the High Court, the matter was heard at some considerable length in the High Court, and the Judges of the High Court delivered a judgment, which was again very complete, dealing with all the disputed facts relating to the actual obstruction complained of and confirmed the findings of the Subordinate Judge, and their Lordships' attention has not been drawn to any respect in which they departed from the findings of the Subordinate Judge; but at the end of their judgment the High Court proceeded to deal with the question of damages in a passage which commences: "There remains the question of damages." The judgment of the High Court sets out certain paragraphs of the plaint, and then it proceeds, "Prayer (*d*) is as follows." Then it sets out the terms of the prayer, which has already been set out in this judgment. The judgment proceeds to quote the terms of the Subordinate Judge's ruling

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on the 14th issue, a passage which has been already referred to, and then it proceeds as follows: "It is difficult to understand why the question of the amount of damages already suffered should not have been decided. The evidence in proof of damages is inadequate." Then it sets out various statements from the evidence, and it proceeds to criticise the evidence as it appeared in fact in the record. Then it proceeds: "Admittedly no papers have been filed to show the usual income from the Kamat lands. This should have been filed before the hearing of the suit. In the plaint there is a prayer to decree the damages already suffered. It is only in regard to future damages (until the removal of the dam) that there is a prayer for subsequent assessment. In my opinion the plaintiffs should have proved by proper evidence at the trial the amount of damages actually suffered up to the date of the filing of the suit. This they have failed to do, and their prayer for damages must be dismissed." Their Lordships disregard the two remands for further investigation which were made before the final decree was drawn up, and which are not material in this appeal. The final decree was in this form: "It is ordered and decreed that this appeal be dismissed"—that is to say, the appeal of the respondents from the judgment of the Subordinate Judge—"and the decree of the Court below be, and the same is hereby confirmed." Then come these words, which are crucial for this appeal to their Lordships Board: "with this variation only, that the plaintiffs' claim for damages be dismissed. It is further ordered and decreed that the plaintiffs shall get one-half the costs of the proceedings at the trial in the Court of First Instance and in the first hearing of this appeal in this Court, but they shall get their whole costs of the proceedings subsequent to the first order of remand in this Court. It is further ordered and decreed that the defendants shall bear their own costs." As has been already said, it is from those words varying the decree of the Subordinate Judge that this appeal is brought, and that is the only issue. Their Lordships have carefully examined the record and they have found nothing in the record which throws any light upon the matters which are the subject of this appeal beyond what has been set out in their judgment. Their Lordships are unable to find that there was any justification for the course taken by the Court in allowing the appeal from the Subordinate Judge to the extent of that variation. An explanation, if it is necessary to seek for

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explanation, of the course taken by the High Court may be that they had not their attention drawn to the petition and order made on the 12th May, 1924, to which their Lordships have already referred. Even so, it might appear that a less drastic course might have been taken than to exclude the appellants from any right to recover damages at all for the wrong committed to their rights as riparian owners. It has been found by the Subordinate Judge, and affirmed by the High Court, that such a wrong was committed and that some damage, whatever the damage may be, has flowed from it, and, that being so, their Lordships see no reason at all to criticise or attack the order which was made postponing the determination of the issue of the amount of damages until after the issue of liability had been determined by the Trial Judge and by the High Court. The course adopted by the Subordinate Judge in so postponing this issue appears to their Lordships to have been a very usual, a very proper and very convenient course, and, in all the circumstances of this case their Lordships can come to no other conclusion than that this part of the judgment of the High Court was made in some way under inadvertence and that their error must be corrected.

In their Lordships' opinion this appeal must be allowed and the order of remand, dated the 5th June, 1928, and the decree, dated 24th June, 1930, of the High Court set aside in so far as they vary the decree of the Subordinate Judge by decreeing that the plaintiffs' claim for damages be dismissed, and also in so far as they deal with the appellants' costs in the proceedings at the trial in the court of first instance and in the first hearing of the appeal in the High Court by awarding to the appellants only half of their costs. In their Lordships' opinion that part of the order and decree of the High Court should be set aside and the order of the Subordinate Judge be restored in so far as it has been varied, that is to say that part of the order which is to this effect: "The plaintiffs are declared entitled to damages, the amount whereof will hereafter be determined." The matter will accordingly be remitted to the Court below to give effect to this judgment of their Lordships and the appellants will have not only one-half of their costs of the proceedings in the Trial Court and of the first hearing of the appeal, but the whole of such costs, and the appellants will

have the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Watkins and Hunter.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

K. J. R. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE MOCKETT.

P. Rajagopala Gramani .. *Appellant* (Defendant).*

v.

Baggiammal .. *Respondent (Plaintiff).*

Rajagopala Gramani *v.* Baggiammal.

Trusts Act (II of 1882), S. 11—Powers of Court—Scope of—Will conferring contingent interest on grand-daughter—No provision for expenses of her marriage—Payment by trustee for such expenses, if can be sanctioned.

Where the Court is called upon to authorise the trustee to do an act or incur an expenditure, which the trustee himself has no power to do, the particular contingency not having been anticipated or provided for by the testator and the consent of the beneficiaries cannot be obtained by reason of their being minors, it is open to the Court to ascertain the paramount intention expressed in the will and to consider if the act to be done by the trustee can properly be read as subordinate to such intention and sanction, on behalf of all the parties interested and if beneficial to them, the act being done by the trustee.

In re *Walker, Walker* v. *Duncombe,* (1901) 1 Ch. 879; In re *New,* (1901) 2 Ch. 534 and In re *Tollemache,* (1903) 1 Ch. 457, on appeal, p. 955, referred to.

Under a deed of trust executed by the testator, his widow was given a life-interest in the income from the property, with remainder over to the settlor's son for life and after his death to his children. There was no provision for the expenses of the marriage and other ceremonies of his son's daughter. On an application by the widow against the trustee for the payment to her of various sums, for the expenses of the consummation ceremony of her grand-daughter, for the expenses of litigation, and for maintenance,

Held, that the will disclosed a paramount intention to benefit the grand-daughter who had a contingent interest in it, that a reasonable amount for the expenses of her consummation ceremony may be sanctioned but that the other items could not be allowed.

On appeal from the judgment of the Hon'ble Mr. Justice Stone, dated the 8th day of August, 1932 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1879 of 1932 in C. S. No. 137 of 1932.

C. Brooke Elliot for *V. Rajagopala Mudaliar* instructed by *Messrs. Short Bewes & Co.* for appellant.

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*O. S. Appeal No. 59 of 1932. 11th October, 1932.

Rajagopala Gramani v. Baggiammal.

Ramesam, J.

K. Krishnaswami Aiyangar for *V. S. Rangachariar* for respondent.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—This is an appeal from the decree of our brother Stone, J., dated the 8th August, 1932, in Application No. 1879 of 1932 in C. S. No. 137 of 1932. The defendant is the appellant before us. The facts out of which this appeal arises may be briefly stated. One Raju Gramani executed a deed of trust on 1st September, 1919, under which he settled his properties upon trust appointing the defendant, who is his son-in-law by his second wife, as trustee. At the time of his death, he had three houses and had a fixed deposit for a sum of Rs. 50,000 in the Imperial Bank. He provided that one of the houses shall be utilised for the residence of the members of his family, that is, his wife and his daughters, until their marriage. The income of the other houses which is said to be Rs. 80 per month was to be utilised by the trustee for paying taxes in respect of the estate, for repairs and for the expenses of his first wife Baggiammal, who is the plaintiff in this suit. After her death, the net income was to be paid over to his son Gnanasundaram and after the death of Gnanasundaram, it was to be distributed equally between his children. But if he dies issueless, it was to be distributed equally between the daughters. The interest accruing on the Fixed Deposit in the Imperial Bank was to be spent similarly. Misunderstandings have arisen between the first wife Baggiammal and the trustee and this suit was filed by Baggiammal against the defendant for the purpose of removing him from trusteeship. A Judge's summons was taken in this suit by a notice of motion for the purpose of obtaining an interlocutory order from the Court directing the defendant to pay (1) Rs. 1,500 required for the nuptial ceremonies of the plaintiff's grand-daughter, that is, the daughter of Gnanasundaram, including the amount required for the earlier ceremony when she attained age; (2) a sum of Rs. 2,000 required for paying off certain creditors from whom she borrowed for the expenses of her suits 268 and 269 of 1931; (3) a sum of Rs. 1,000 required for paying off the decree-holder in S. C. S. No. 2480 of 1931, the plaintiff having borrowed that amount for the marriage expenses of her grand-daughter from one Ratna Bai; and (4) certain miscellaneous

items, such as maintenance, etc., amounting to Rs. 1,000. Altogether she applied for the payment of Rs. 6,500.

The duties of the trustee are defined in the deed of trust already mentioned. No provision was made by the settlor for expenses of suits between his wife and the trustee, nor has he provided for the expenses of the marriage and nuptials and other ceremonies connected with his grand-daughter. It is very difficult to say what exactly he intended. Perhaps he intended that the expenses of the marriage and other ceremonies of the grand-daughter were to be defrayed by the wife out of the net income which was to be paid to her, or perhaps it was an oversight on his part. The duties of the trustee are governed by S. 11 of the Trusts Act which runs as follows:—

"The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract. Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a Principal Civil Court of Original Jurisdiction."

In this case Gnanasundaram's children are both minors and other children may be born who are entitled to take under the trust deed. The Court's consent is therefore necessary. S. 11 is based on the well-recognised principles of English law. In In re *Walker, Walker* v. *Duncombe*[1] Farwell, J., observed:

"The question that I have to consider is whether I can on the true construction of this will authorize the trustees to make any expenditure larger than the sum mentioned in the will. I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible. But in considering what is the true construction of the will, it is open to the Court to ascertain if there be a paramount intention expressed in the will, and if so, to consider whether particular directions are properly to be read as subordinate to such paramount intention, or are to be treated as independent positive provisions."

Here there being a paramount intention to benefit the grand-daughter, the question is whether the Court cannot sanction expenses for her marriage and other ceremonies as subordinate to that intention. In *New's case*[2] it was held:

" Where . . . . there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not yet in existence, the Court will exercise its general administrative jurisdiction by

1. (1901) 1 Ch. 879 at 885.

2. (1901) 2 Ch. 534.

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——
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sanctioning, on behalf of all parties interested, those acts being done by the trustees"

and it is said that this principle particularly applies where the estate consists of a business or of shares in a mercantile company. In In re *Tollemache*[1] on appeal from the judgment of Kekewich, J., on page 457 of the same volume, the Court on appeal affirmed the judgment of Kekewich, J. and dismissed the appeal. Romer, L. J., said:

"*New's case*[2] shews how far the Court will go, and beyond what point it will not go."

Cozens-Hardy, L. J., observed:

"In my opinion, *New's case*[2] constitutes the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts."

In Kekewich, J.'s judgment at page 457 he enumerated various sub-headings of this extraordinary jurisdiction. The first sub-heading is where an advance was sought out of the capital of the estate for the benefit of a minor who is a beneficiary with a vested or contingent interest. The present case must if at all fall under this heading. The second sub-heading is where a business has got to be continued. The third is where a business is to be sold to a joint-stock company. The fourth is where re-construction of a company is contemplated. The fifth is where mortgages have got to be dealt with. As I already said, the further headings do not help the petitioner in this case—*vide also* Lewin on Trusts, pages 319 and 398. Having regard to the principles laid down in the above cited English cases and the provisions of S. 11 of the Trusts Act, we think we may sanction a reasonable amount for the expenses of the consummation ceremony of the grand-daughter. But we think the amount sanctioned by the learned Judge is rather too high. We think it is enough to allow Rs. 750 for the coming of age ceremony and for the consummation ceremony, the amount to be distributed according to the discretion of the grandmother. This amount may be raised by a loan in the Imperial Bank or any other Bank on the security of the Fixed Deposit receipt at a reasonable rate of interest and the interest and the principal of the loan should be paid off in monthly instalments of Rs. 50 to be deducted out of the monthly payment to the plaintiff from the net income. If before the loan is discharged the plaintiff and Gnanasundaram die, the balance should be debited against

1. (1903) 1 Ch. 955. 2. (1901) 2 Ch. 534.

the interest of the grand-daughter Chandrambal. But as to the second, third and other items, we are unable to see how these expenses fall within the principles mentioned above.

It is said by the learned Advocate for the respondent that the trustee practically consented to the order of the learned Judge. Mr. Brooke Elliot, who appeared before us for the appellant, denies that he ever consented, but, on the other hand, opposed the petition. He however stated his willingness to obey the directions of the Court. The trustee is of course bound to obey the directions of the Court and a statement to that effect cannot amount to a consent that the plaintiff's application in respect of the various items should be allowed. Even Mr. Krishnaswami Aiyangar does not say that there was any consent that a particular amount should be awarded. Under these circumstances we think that the matter is really left to the Court to decide under S. 11 of the Trusts Act. The consent of the other beneficiaries will not be necessary.

We allow the appeal to the extent indicated above. The plaintiff will pay 2/3rd of the costs of the trustee to be debited against her monthly allowance in instalments. The trustee will re-imburse himself in respect of his own costs from the interest on the trust estate. The direction to pay the amount to the Advocate will remain.

Mockett, J.

Mockett, J.—I agree. I must however add that I am satisfied that, whether there was or was not a consent decree in the strict sense, there was no serious opposition to the course adopted by the learned Judge. Previous orders in this trusteeship had been made by several Judges of this Court, all apparently by consent. Now the trustee takes up the correct attitude that the terms of the trust deed must be strictly applied and on that basis informs us that he argued before the learned Trial Judge and has now in this appeal through his counsel addressed learned arguments to us based on the provisions of the Indian Trusts Act and certain decisions of the English Chancery Courts. We must of course accept this assurance. I cannot help thinking that the argument before us was at least a little more emphatic than that addressed to the learned Judge. I do not find in the learned Judge's judgment which has not been printed and which is very brief any indication that the question of importance which is now raised was argued before him. I mention this as I was at one time during the course of

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this appeal of opinion that we ought to send the matter back to the learned Trial Judge for decision after argument, but after what Mr. Brooke Elliot has said, I concur with my learned brother that as the matter has now been fully argued before us it is better to deal with it here in the interests of saving judicial time.

The facts have been stated by my learned brother and I do not propose to repeat them. It is sufficient to say that in the estate of Raju Gramani, deceased, his widow the plaintiff is given a life-interest, with remainder over to the settlor's son for life and after his death to his children. The widow Baggi-ammal is now suing to remove the trustee with whom she is quarrelling. In fact she asks for Rs. 1,500 for the nuptial ceremonies of her grand-daughter, Rs. 2,000 for paying off creditors from whom she borrowed for the expenses of litigation in 1931 and Rs. 1,000 for paying off a decree-holder. This debt was in respect of money borrowed for the marriage expenses of her grand-daughter and miscellaneous items to the extent of Rs. 1,000. She asks that this money should be advanced out of the capital of the trust property. We are told that this widow is an elderly lady. It must be borne in mind that she has a life-interest only. There is no specific provision for maintenance or for raising loans in the trust deed. But S. 41 of the Trusts Act would appear to give power to the trustee to do this when necessary. That surely must apply to the case of persons having reversionary interest in the capital. S. 11 of the Act deals with the duties of trustees. It will be seen that they are bound to carry out the purpose of the trust except as modified by the consent of all the beneficiaries being competent to contract or where the beneficiary being incompetent to contract, the consent of a principal Civil Court of Original Jurisdiction has been obtained. There is a proviso that nothing in the section requires the trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries. Now it is clear I think that to raise Rs. 6,500 out of the capital for the purposes for which it is intended in this case to be used is not within the provisions of the Trusts Act. There has been no consent of the beneficiaries competent to contract and it is not suggested the matter was brought to the learned Trial Judge on the basis that this was a matter so beneficial or advantageous to the minor beneficiaries that the

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formal permission of the Court should be obtained. S. 11 of the Trusts Act would appear to have been founded on the principles which are specifically stated in *New's case*[1] and I think that the doctrine therein enunciated applies to this country, namely, that "where an emergency or a state of circumstances which, it may reasonably be supposed, was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument arises, the Court would exercise its general administrative jurisdiction on behalf of all the parties interested." As pointed out, *New's case*[1] has been held in England now to "constitute the high water-mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts." The judgment of Kekewich, J., in *Tollemache*, In re[2] (which is approved by the Court of Appeal in *Tollemache*, In re[3] and which appears to be the leading case on the subject) sets out the grounds on which the extraordinary jurisdiction of the Court would be exercised. I agree with my learned brother that the only payment which has been sanctioned in this case and which can conceivably be brought within that judgment is the amount of the nuptial expenses of the grand-daughter who has a contingent interest in the trust. My learned brother considers that Rs. 750 is adequate for the purpose named and I of course agree with him in any estimate of this sort. I also agree with the safeguards which he has named for the protection of the *corpus* of the trust property against diminution caused by the raising of Rs. 750. I agree that the appeal should be allowed to the extent which this sole payment involves and also with the order proposed as to costs.

S. R. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Dumpala Venkanna .. *Petitioner** (*1st Defendant*)

v.

Vutla Subbayya and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Venkanna *v.* Subbayya.

Negotiable Instruments Act (XXVI of 1881), S. 60—Promissory note—Holder losing possession of note—Execution of fresh note—Full pay-

*C. R. P. No. 823 of 1929. 7th September, 1932.

1. (1901) 2 Ch. 534. 2. (1903) 1 Ch. 457.
3. (1903) 1 Ch. 955.

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ment and discharge—Holder in due course of first note bringing suit on the note—Whether maker should pay again.

Where the holder of a promissory note was, against his wishes, kept out of possession of the note by his wife and nephew and, undoubtedly with the intention of discharging the note, he got the defendant or maker to give him another note for the principal and interest till then due on the old note, and the holder endorsed the new note to another to whom full payment was made by the defendant and long after this, the holder having died, his widow, knowing undoubtedly all that had happened about her husband's having had the first note discharged, endorsed that note which was "waste paper" to the plaintiff, and on the plaintiff's bringing a suit on the note, the Lower Court held, the plaintiff was the holder of the note in due course from the widow and that the defendant should pay the debt over again though he had already paid it.

Held, that the decree of the Lower Court in favour of the plaintiff should be set aside as the true view would be, not that this was a case of an overdue note endorsed with all defects of title but of an endorsement of a piece of "waste paper" which could give no right at all.

Harry Van Ingen v. *Dhunna Lall Lallah*, (1881) I. L. R. 5 Mad. 108, followed.

Duraisami Reddi v. *Velu Asari*, (1916) 2 M. W. N. 107, dissented from.

Glasscock v. *Balls*, (1889) 24 Q. B. D. 13 and *Ramanadan Chettiar* v. *Gunbu Aiyar*, (1928) 113 I. C. 456, distinguished.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Bapatla, dated the 27th day of August, 1928 and made in S. C. S. No. 76 of 1928.

P. Satyanarayana Rao for petitioner.

V. Subramanyam for respondents.

The Court delivered the following

JUDGMENT.—The petitioner is the defendant against whom a decree has been given on a promissory note for Rs. 60-10-0, dated 14th October, 1925, executed by him to one Ankamma, deceased, from whose widow, Seshamma (3rd Defendant), the Plaintiff took an endorsement on 17th December, 1927, after her husband's death which took place in March, 1926. The defence was that the note had been discharged by execution of a fresh note to the payee. It appears that Ankamma, the payee, and his wife, 3rd Defendant, Seshamma, who had no male issue, were bringing up two nephews, that Seshamma, with the assistance of one of the nephews who was siding with her, got possession of the suit note and other documents from her husband, that though the latter complained to the authorities he could get no assistance from them as the matter was declared to be a family quarrel, that thereupon Ankamma took a fresh note, Ex. I, from the Defendant on 5th March, 1926, in substitution and discharge of the suit note, and endorsed it to a daughter of the other nephew who was siding with him and

that the Defendant paid off the amount of the new note to the holder of that note. There were also pleas questioning the *bona fides* and consideration of the endorsement to the Plaintiff. The District Munsif found the facts as above stated but also that the Plaintiff paid consideration to the widow for the endorsement of the suit note and took it without knowledge of the facts above stated. On these findings he had held that the Plaintiff is a holder in due course from the widow and that the 1st Defendant (petitioner) must pay the debt over again though he has already once paid it.

It appears to me that the District Munsif has fallen into the error of ignoring S. 60 of the Negotiable Instruments Act. That section (corresponding to S. 36 (1) read with S. 59 (1) of the Bills of Exchange Act) lays down that a negotiable instrument may be negotiated until payment or satisfaction by the maker, drawee or acceptor at or after maturity but not after such payment or satisfaction. This section carried out the fundamental principle that a negotiable instrument loses its character as such after the instrument (as distinguished from a party thereto) is discharged. A bill or other negotiable instrument is discharged in the words of S. 60 by payment or satisfaction by the maker, drawee or acceptor after maturity, or, as S. 59 (1) of the English Act puts it, by payment in due course by or on behalf of the drawee or acceptor, which latter term includes the maker of a promissory note: *see* S. 89 (1). Thus both enactments convey the same idea because 'payment' according to the English Act need not be payment in cash. But the holder may receive satisfaction in any other form. *See* Chalmers' Bills of Exchange Act, 9th Edn., pp. 233 and 234. On such payment or satisfaction at or after maturity by the maker of a promissory note it ceases to be negotiable. The consequence of that as settled more than a century ago is that if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument. [*See* Chalmers, p. 233 and cases cited in Note (*d*).]

But the learned advocate for the Respondent (plaintiff) has relied on two decisions of this Court, *Duraisami Reddi* v. *Velu Asari*[1] and *Ramanadan Chettiar* v. *Gunbu Aiyar*[2] and the decision of the Court of Appeal in *Glasscock* v. *Balls*[3] for the

1. (1916) 2 M. W. N. 107.
2. (1928) 113 I. C. 456.
3. (1889) 24 Q B. D. 13.

contentions that though a note is fully paid and discharged but left with the payee, it continues to be negotiable and that a holder in due course can recover against the maker either on the ground that the note was not overdue and mere payment is not evidence of a demand and that payment was only an equity attaching to the note which would bind only those who were aware of it or on the ground of estoppel, that where one of two innocent parties has to suffer by the fraud of a third person he who facilitated the fraud by his neglect (in this case the omission to take back the note on payment) must bear the loss.

The decision in *Duraisami Reddi* v. *Velu Asari*[1] is of a late learned Judge whom I remember with respect and attachment. It is in favour of the Respondent's argument. But I am sorry to have to differ from it as it is based on a misunderstanding of the authorities relied on and the principle involved. In that case a promissory note for Rs. 200 was given for future instalments due to a chit fund. Some instalments were paid and the payment endorsed on the note. Subsequent payments were not so endorsed. The payee endorsed the note to the Plaintiff two years after the date of the note after it was fully paid off and apparently after the chit fund had terminated. It was found that the Plaintiff had paid consideration and did not know that the note had been fully paid when he took the endorsement.

In reversing a decree dismissing the suit, the learned Judge had to deal with S. 60 and a previous decision in *Commundun Mohideen Saib* v. *Oree Meerah Saib*[2] of the year 1873. In doing so he refers to Ss. 59, 9 and 82 to support his conclusion that the maker who pays off a note is not discharged from liability if he fails to take back the note as the payment is not made in due course. I very respectfully think that herein lurks a confusion of two distinct ideas—one the discharge of a note by payment on maturity, *i. e.*, in the case of a note payable on demand after a demand has been made expressly or by implication from conduct and the other the effect of leaving a discharged note in the hands of the payee as a ground of estoppel against the maker. The former question is a part of the law of Negotiable Instruments. The latter is entirely independent of that law and is a branch of the law of estoppel. They must be kept distinct for a proper decision.

1 (1916) 2 M. W. N. 107.
2. (1873) 7 M. H. C. R. 271.

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On the first point the reference by the learned Judge to Ss. 59, 9 and 82 is not material to the effect of S. 60. S. 59 deals with the rights of holders who became such after dishonour or after maturity and says that except in the case of accommodation bills, the transferee gets only the rights of the transferor. The whole section deals with a situation when, *ex hypothesi*, the instrument has not been paid or discharged by the principal party liable thereon. But S. 60 deals with the effect of payment or discharge by the principal party liable on the instrument, maker in the case of a promissory note and drawee or acceptor in the case of bills.

The opinion of the learned Judge that S. 60 does not affect a holder in due course is at variance with the settled law of Negotiable Instruments for more than a century in England both before and after the Bills of Exchange Act. And in India that is what Innes, J., meant in *Commundun Mohideen Saib* v. *Oree Meerah Saib*[1] when he said referring to *Bartrum* v. *Caddy*[2] that if there had been a settlement and discharge, it would have been a good defence against an endorsee though for value and without notice. This decision though given before the Negotiable Instruments Act is still good law by reason of Section 60 which means the same thing. The learned Judge (Seshagiri Aiyar, J.) was also not accurate in attributing to Kernan, J., in the *Commundum Mohideen Saib* v. *Oree Meerah Saib*[1] case, the view that discharge of a note was an equity applicable to holders of overdue notes. The fact is that both the Judges (Innes and Kernan, JJ.) found that there had been no discharge as pleaded by the Defendant in that case. If there had been a discharge there would have been an end of the Plaintiff's case even though he was an endorsee for value without notice. But, in the absence of a discharge, the Court went on to consider whether at the time of the endorsement to Plaintiff, the note was overdue which depended on whether there had been a demand express or by conduct. If it was, the Plaintiff as endorsee would be bound by all the equities to which the endorser was subject; *aliter* if it was not. The equity was not discharge of the note which was not proved; but the agreement made at the time of the note between the maker and payee that the amount

1. (1873) 7 M. H. C. R. 271 at 275.
2. (1838) 9 Ad. & Ellis. 275: 112 E. R. 1216.

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recoverable on the note was to be only what was due on the account between them of cloth supplied by the maker for which purpose the advance on the note was in fact made. The Judges found (Innes, J., from the fact that there had been part payment from which he inferred a previous demand and Kernan, J., from the direct evidence of demand) that there had been a demand before the endorsement and hence that the note was overdue. Incidentally it is interesting to note that Kernan, J., added, at p. 281, that for the equities to attach to an endorsement of an overdue note, it was not necessary that the endorsee should know at the time of endorsement that there had been a demand, *i.e.*, that the note was overdue.

Nor does the reference by Seshagiri Aiyar, J., to the expression "before it became payable" in the definition of "holder in due course" advance the matter, as a note payable on demand is payable "on demand," and the only evidentiary value in this connection of part payment towards an on demand instrument is to show that there was in all probability a demand for the whole.

The learned Judge refers to good faith and want of negligence in the definition of "payment in due course" and says that failure to secure the note after discharging it is not acting in good faith and without negligence. I can understand the argument based on estoppel by reason of leaving a discharged note with the payee with which I will deal separately. But the good faith and want of negligence mentioned in the definition is as regards the person to whom the payment is made as shown by the rest of the definition where it says "under circumstances which do not afford a reasonable ground for believing that he (the person receiving payment) is not entitled to receive payment." This error has crept into the learned Judge's remarks on S. 82 where "payment in due course" occurs in clause (*c*). It may also be added that this section deals generally with discharge of parties and not discharge of the instrument which is dealt with in S. 60.

The learned Judge then refers to a remark of Lord Esher in *Glasscock* v. *Balls*[1]. The case itself was not a case of payment or discharge of a note by the maker and endorsement of it afterwards by the payee but of a person who held both a promissory note and a mortgage transferring the mortgage to one person and endorsing the note to another—the Plaintiff. The Defendant,

1. (1889) 24 Q. B. D. 13.

the maker, had paid nothing but was sued on the note by the Plaintiff, the mortgage being outstanding with the transferee. The Defendant was obviously not entitled to plead the doctrine of discharge, because he had not discharged the note. But that was the argument on his behalf. The Court of Appeal rejected it. Discharge being thus out of the case, was there anything to show that the note was overdue before endorsement so as to fix the Plaintiff with the real nature of the promissory note, that it could not be negotiated after realising what was due by transferring the mortgage? As to this Lord Esher said that the Plaintiff cannot be said to have taken the note when overdue because it was not shown that payment was ever applied for. It was to these facts that Lord Esher's remark applies that "If a negotiable instrument remains current even though it has been paid there is nothing to prevent a person, to whom it has been indorsed for value without knowledge that it has been paid, from suing?" That case and the remark quoted are no authority for the purpose for which Seshagiri Aiyar, J., used them—that even after a note is discharged at or after maturity by the maker it remains negotiable in the payee's hands and that an endorsee for value without notice can sue on it.

On the question of discharge terminating the negotiability of a note and therewith the right of a subsequent endorsee with or without knowledge, the decision in *Harry Van Ingen* v. *Dhunna Lall*[1] is directly in point. Of the three notes sued on by the Plaintiff (endorsee) in that case it was held that one (Ex. B) had been discharged by payment by the purchaser of Defendants' business on his behalf. It was also found that the payee of the note (Alfred Arathoon) was also a partner of the firm which purchased Defendants' business retained the note B in his hands after it was discharged and subsequently endorsed it with Exs. A and C to the Plaintiff. In those circumstances it was held that the Plaintiff was not entitled to recover the amount of Ex. B from the Defendant. "The obligation arising out of it was thereby extinguished and Alfred Arathoon had no power by re-endorsing it to bring into existence again the liability of the Defendant. *Bartrum* v. *Caddy*[2]. His re-issue of the note was a fraud." But I observe that the learned Judge in *Duraisami Reddi* v. *Velu Asari*[3] to whom

1. (1881) I.L.R. 5 Mad. 108. 2. (1838) 9 Ad. & Ellis. 275: 112 E.R. 1216.
3. (1916) 2 M.W.N. 107,

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this case was cited failed to note that in this respect the decision was directly against his own.

The other case cited for the Respondent, *Ramanadan Chettiar* v. *Gunbu Aiyar*[1], was not a case of discharge and therefore is no authority on the point before me. All that appears is an incidental reference to the remark of Lord Esher already referred to in *Glasscock* v. *Balls*[2]. The case itself is irrelevant to this.

"Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect—they are grounds of nullity. That which purports to be a bill is no longer such; it is mere waste paper."—Chalmers, pp 141-2.

On the facts on which the District Munsif has decided against the Defendant, the decision was clearly against law. Ankamma, the holder, was against his wishes kept out of possession of the note by his wife and nephew and undoubtedly with the intention of discharging the note got the Defendant to give him another in substitution. The Defendant gave Ankamma another note for the principal and interest till then due on the old note. Ankamma endorsed the new note to another to whom full payment was made by Defendant. Long after all this, Ankamma having died meanwhile, the widow, who undoubtedly knew all that had happened about her husband's having discharged the first note, endorsed that note which as above stated was "waste paper" to the Plaintiff. There can be no question after all this whether there had been any demand on the first note; in other words, whether it was overdue, for without it, it could not have been discharged by substitution. If anything depended on defects of title as affecting the Plaintiff's endorsement, there can be no doubt that as the note was certainly overdue, the Plaintiff will get no better title than the widow and will not be entitled to a decree. But the true view is not that this is a case of an overdue note endorsed with all defects of title but of an endorsement of a piece of waste paper which could give no right at all.

The only other point left is whether the Plaintiff can succeed on the ground that he is an innocent person against whom a fraud by the widow has been facilitated by the default or neglect of the Defendant in leaving the old note with the payee and that the Defendant must bear the loss so falling on the Plaintiff.

1. (1928) 113 I.C. 456. 2. (1889) 24 Q.B.D. 13.

This was not the ground on which the Munsif gave the Plaintiff a decree. This new ground raises really new questions of fact on some of which at least the Munsif's opinion would have been valuable. The Defendant was not negligent in not getting back the old note because it was then not with Ankamma but with his wife who was illegally detaining it. Whatever may be said, to which I will presently come, if Ankamma being left with the note had himself fraudulently endorsed it to Plaintiff, no such blame attaches to Defendant in the circumstances. Though the Munsif thinks that there was no offence in Seshamma's detention of the note, I am by no means sure that her keeping it against Ankamma's wishes with the intention of appropriating it was not technically dishonest and if so her offence however technical was criminal misappropriation. She could not in that view pass a better title to the Plaintiff than her own. Even if she was not an offender she was at least a wrong-doer. I am not aware of the doctrine now invoked being used against a Defendant in such circumstances. The Defendant in no manner facilitated the fraud by the widow, because from the first her possession was against the wishes of Ankamma and of the Defendant after he became entitled to get the note. Ankamma's wife was first guilty of conversion of the note, against her husband, then against the Defendant and finally guilty of deceit by passing it off on the Plaintiff. The proximate or real cause of the fraud played on the Plaintiff was not any negligence on the part of the Defendant or Ankamma but the wrongful act of the wife which neither of them could reasonably prevent. If *A* pledged his watch with me and then pays his debt to me but, before I can return the pledge to *A*, if I lose it or some one steals it and the finder or the thief pledges it as his own, has *A* or have I facilitated a fraud ? I think not.

But certain passages in *Duraisami Reddi* v. *Velu Asari*[1] are relied on where the learned Judge relies on the observations of Collins, L. J., in *Nash* v. *De Freville*[2]. The facts to which those observations were appropriate are quite different from those in this case and in *Duraisami Reddi* v. *Velu Asari*[1]. The Defendant had borrowed from a Solicitor Peed on three promissory notes and some time later received more advances and executed two consolidated notes for the whole sum.

1. (1916) 2 M. W. N. 107. 2. (1900) 2 Q. B. 72.

Venkanna
v.
Subbayya.

All the five notes including the first set of three notes which were satisfied by substitution were left with Peed on the understanding that they were not to be negotiated. But Peed endorsed them for value to the Plaintiff who was ignorant of the understanding. After some months, *i. e.*, when Peed was no longer in possession of the notes, the Defendant paid off the whole debt to him but failed to get back the notes. After some more months, on Plaintiff's demand of payment, Peed gave him a cheque on a Bank where he had no credit and Plaintiff returned the notes which Peed immediately sent to the Defendant who took them in good faith and put them into the fire. The cheque was dishonoured; and Peed absconded and was afterwards adjudicated bankrupt. The Plaintiff sued the Defendant for conversion of the notes which were obtained from him by the fraud of Peed. The real question on which the decision, turned as stated by A. L. Smith, L.J., was whether the Defendant when he got back the notes from Peed got a better title than Peed had. If he did, he would succeed, if otherwise, the Plaintiff. From the judgments delivered, especially by Collins, L. J., it is clear that the principle of *Lickbarrow* v. *Mason*[1] (that of two innocent persons one of whom must suffer by the fraud of a third, he must sustain the loss who has enabled the third person to occasion it) was called in aid not with reference to Peed's obtaining back the notes from Plaintiff by means of the worthless cheque but with reference to his earlier act in negotiating the notes in violation of the agreement between him and the Defendant. *See* p. 83. The essence of this was that the Defendant put the Solicitor in possession of instruments in their form negotiable though with a promise not to negotiate them and so put it in his power to negotiate them.

"When these notes were negotiated by Peed they were still current and the Defendant was estopped as against the Plaintiff from setting up any fact which would have defeated Peed's right to negotiate them ; for instance, the fact that Peed was under a duty to the Defendant to return them and not to negotiate them"—p. 85.

The estoppel had nothing to do with Defendant's leaving the notes with Peed after payment. For in fact Peed had not got them then, though Defendant was ignorant of this, and only got them some months later by a trick played on Plaintiff to which the Defendant did not contribute by any act

1. (1787) 6 East, 21.

or omission of his. This is further brought out in the latter passages where the learned Judge deals, on grounds other than estoppel, separately with the first three notes which were satisfied and the two later notes which were unsatisfied. As to the former on the footing that they were overdue or actually paid he says at p. 87:

"These pieces of paper therefore as between the Defendant and Peed, having lost their negotiable quality, are denuded of that element which alone makes it possible for a transferee to get a better title than his transferor."

On the whole it seems to me that this case is not an authority for what is relied upon in *Duraisami Reddi* v. *Velu Asari*[1], *i.e.*, that after discharge by satisfaction at or after maturity of a promissory note, by the maker, an estoppel against him arises by the mere fact that "the piece of paper" or "waste paper" which once had but has lost its negotiable quality is left with the payee and he passes it off on others as if it were still a negotiable instrument. The case is of course different if the payment or satisfaction takes place before maturity, when the instrument is current; in the case of a promissory note payable on demand, before demand.

The principles of this branch of estoppel are summarised in Halsbury's *Laws of England,* Vol. 13, pp. 398 to 402 and there is a useful summary of the cases in Note (*t*).

The decree of the Lower Court is set aside and the suit dismissed with costs of 1st Defendant in both Courts.

K. C. —— *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Karuveeppil Veera Vunni's younger brother Ahammad Kutty and others .. *Appellants* (Counter-petitioners 1 and 6 and L. Rs. of 6th Counter-petitioner—2nd Defendant and 9th Defendant's legal representative)*

v.

Kottakkat Kuttu .. *Respondent (Petitioner-Plaintiff).*

Ahammad Kutty
v.
Kottakkat Kuttu.

Limitation Act (IX of 1908), Art. 182 (2) and (4)—Decree—Execution—Starting point, whether date of High Court's confirmation on appeal—Subsequent amendment whether could revive execution application barred by limitation.

*C. M. S. A. No. 123 of 1927. 18th August, 1932.

1. (1916) 2 M. W. N. 107.

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In a partition suit, a preliminary decree for partition in favour of plaintiff was confirmed on 31st March, 1919, by the first appellate Court and on 20th March, 1923, by the High Court. On 30th September, 1919, final judgment was pronounced in the partition suit. The decree was delayed up to 1924 in being drawn up owing to insufficiency of stamp papers supplied, but when it was finally drawn, it bore the date of decree as 30th September, 1919. An execution application was filed on 24th March, 1925, but before that date on 6th December, 1924, the decree was amended as per order in a previous execution petition filed by plaintiff in 1924. On the question whether the execution applications were time-barred,

Held, (1) that on a true interpretation of Art. 182 (2) of the Limitation Act, having regard to its context, limitation in the present case should not be computed from the date of the High Court's decree on 20th March, 1923, but from the date of the final decree on 30th September, 1919.

Somar Singh v. *Deonandan Prasad Singh*, (1927) I. L. R. 6 Pat. 780, dissented from.

Ashfaq Husain v. *Gauri Sahai*, (1911) L.R. 38 I. A. 37: I. L. R. 33 All. 264: 21 M. L. J. 1140 (P.C.), explained.

Held also, that a decree which had already become time-barred by limitation could not be revived for purposes of execution by a subsequent application for amendment.

Rabiuddin v. *Ram Kanai Sen*, (1920) 59 I. C. 186 and *Jhamman Lal* v. *Daulat Ram*, A. I. R. 1924 Lah. 329, followed.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut, dated 23rd March, 1927 and made in A. S. No. 260 of 1926 preferred against the order of the Court of the District Munsif at Parappanangadi, dated 28th September, 1925 and made in E. P. No. 544 of 1925 in O. S. No. 105 of 1914.

K. Kuttikrishna Menon for appellants.

P. Govinda Menon for respondent.

The Court delivered the following

JUDGMENT.—Defendants 2 and the L. Rs. of Defendant 9 are the appellants. This Civil Miscellaneous Second Appeal arises out of an application for execution made by the decree-holder in O. S. No. 105 of 1914 (Parappanangadi District Munsif's Court) to execute a partition decree. The question for decision is whether the application is barred by limitation or not.

The facts are briefly these: In O. S. No. 105 of 1914 the plaintiff-respondent obtained a preliminary decree for partition on the 18th of April, 1918. The decree was confirmed in appeal on 31st March, 1919, by the first appellate Court and on the 20th of March, 1923, by the High Court. On the 18th of April, 1918, the plaintiff applied for a final decree and on the 30th of September, 1919, a final judgment was pronounced. As the requisite stamp papers were not supplied in time, the final decree was drawn up only on the 14th of December, 1924. As

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the decree must bear the date on which the judgment was pronounced the decree that was drawn up in 1924 bears the date 30th September, 1919. The plaintiff-decree-holder puts in an execution application, E. P. No. 502 of 1924, but that petition was not pressed and was consequently dismissed. The petition out of which the present proceedings arise, E. P. No. 544 of 1925, was filed on the 24th of March, 1925. It will be observed that the present petition as well as the previous one has been put in more than three years after the date of the final decree, and the question is whether, in the circumstances, these petitions are time-barred.

It was argued before the District Munsif that the period of three years for executing the decree in this case under Art. 182, cl. (2) of the Limitation Act should be calculated from the date of the High Court's decree and that, therefore, the petitions are not time-barred though they were filed beyond three years from the date of the final decree which is the one now sought to be executed. He did not accept this argument but held that the time for execution began to run from the date of the final decree. On appeal the learned Subordinate Judge came to a contrary conclusion and held that the time began to run from the date of the High Court's decree and that, therefore, the applications are not time-barred. He held that the applications are not time-barred for another reason also. I have already stated that the final decree was passed on the 30th of September, 1919. But on the 6th of December, 1924, it was amended as per order on E. A. No. 1249 of 1924. It was contended before the learned Subordinate Judge that the decree having been amended on the 6th of December, 1924, the decree-holder has got three years' time to execute the decree from the date of this amended decree under Art. 182, cl. (4) of the Limitation Act and that, therefore, the applications are within time. This argument was accepted by the learned Subordinate Judge and on this ground also he held that the applications were not time-barred. Another point was also argued before the learned Subordinate Judge and that was, that the final decree in this case was drawn up only on the 14th of December, 1924, that till then there was no decree which could have been executed and that the petitioner had therefore three years' time from the 14th of December, 1924. The decree that was drawn up in 1924 bears the date 30th September, 1919. The

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learned Subordinate Judge did not express any definite opinion upon this point. But as the argument is obviously untenable, it was not pressed before me by the learned counsel for the respondent.

And so, the two points arising for determination in this Second Appeal are (1) whether the period for the execution of the decree should be calculated from the date of the High Court's decree (*i. e.*, 20th March, 1923), or from the date of the final decree (*i. e.*, 30th September, 1919); (2) whether time in this case can be calculated under Art. 182, cl. (4) of the Limitation Act from the date of the amended decree.

I shall first deal with the question with reference to Art. 182, cl. (2) of the Limitation Act. Under this clause the period of the prescribed three years is to be calculated from " (where there has been an appeal) the date of the final decree or order of the Appellate Court or the withdrawal of the appeal". It is argued for the appellant that since there has been no appeal against the final decree, time for execution should be calculated from the date of the final decree, which is the decree sought to be executed and not from the date of the High Court's decree passed in appeal against the preliminary decree. On the other hand, the respondent contends that there is nothing in the wording of cl. (2) of Art. 182 to show that the appeal therein referred to is an appeal against the decree sought to be executed and since there has been an appeal in the present case, though not against the final decree, the date of the final disposal of the appeal should be the date from which the period of limitation should be computed. In support of this view it is urged that the appeal against the preliminary decree may imperil the decree sought to be executed and therefore the legislature has deliberately extended the period by fixing the date of the disposal of the appeal as the date for calculating the period of limitation. It is somewhat curious that this question has not arisen for decision in any of the High Courts with reference to the execution of a partition decree. But the question arose in *Somar Singh* v. *Deonandan Prasad Singh*[1] in connection with the execution of the final decree in a mortgage suit in which an appeal had been filed against the preliminary decree. In that case a preliminary decree in a mortgage

1. (1927) I. L. R. 6 Pat. 780.

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suit was passed on the 23rd of August, 1921 and there was an appeal against that decree to the High Court. During the pendency of the appeal the mortgagee-decree-holder obtained a final decree for sale on the 28th of October, 1922. The appeal to the High Court against the preliminary decree was dismissed on the 29th of October, 1925. The application for execution was made on the 2nd of February, 1926. The judgment-debtor contended that the application was barred by limitation. It was held by the learned Judges that limitation ran from the date of the final disposal of the appeal by the High Court and that therefore the application for execution was within time. This decision is strongly relied on by the learned counsel for the respondent. If the decision correctly lays down the law, there can be no doubt that it may be applied to this case. The fact that the decree in that case was passed in a mortgage suit while the present one was passed in a partition suit does not make any difference with regard to the application of the principle. The appellant's learned counsel argues that this decision does not lay down the correct law.

The conclusion arrived at by the learned Judges in *Somar Singh* v. *Deonandan Prasad Singh*[1] is based mainly on two considerations: (1) the wording of the clause, and (2) a decision of the Privy Council in *Ashfaq Husain* v. *Gauri Sahai*[2]. I shall first consider the Privy Council decision and see whether it supports the principle extracted from it by the learned Judges. To appreciate the decision it is necessary to state the facts of the case. These appear in the headnote as follows:—

"A decree for sale on a mortgage was passed against several defendants jointly on the 25th August, 1900, and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March, 1902. Subsequently a decree was passed on the merits against this defendant on the 15th August, 1902, and her appeal was dismissed by the High Court on the 16th November, 1904, and as against her that decree was made absolute on the 27th November, 1905. An application for execution was made against all the defendants on the 21st December, 1905, based on the decrees of the 25th August, 1900, the 15th August, 1902, the 16th November, 1904, the 21st December, 1901, and the 27th November, 1905."

The defendants contended that the decrees of the 25th August, 1900, and the 21st December, 1901, were time-barred. *Prima facie* the application was barred by limitation. But their

1. (1927) I. L. R. 6 Pat. 780.
2. (1911) L. R. 38 I. A. 37: I. L. R. 33 All. 264: 21 M. L. J. 1140 (P. C.).

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Lordships of the Privy Council held that the decrees of the 25th August, 1900 and the 16th November, 1904, were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former and for the first time justified the plaintiff in applying for the joint execution of the decree. Time under the Limitation Act began to run from the date of the latter decree, or rather from the date on which it was made absolute, the 27th November, 1905, and consequently the application was not barred. From the reasoning adopted by their Lordships it does not appear to me that this case can be used as an authority for the position contended for by the appellant. Their Lordships do not say that time should be calculated from the 16th November, 1904 (or rather from the 27th November, 1905) because this is the date of the final decree of the appellate Court but what they say is that time should be calculated from that date because "It was then for the first time that the Court granted a complete decree to the respondent". According to their Lordships the plaintiff was entitled to get a joint decree against all the defendants. But owing to an irregularity in procedure the decree which he obtained against one of the defendants was set aside and ultimately a decree was passed against that defendant. Their Lordships point out that the decree, dated the 15th November, 1904, was the second step in granting to the plaintiff the relief to which he was entitled, the first step being the original decree of the 25th August, 1900. Considered in this view, the decree of the 16th November, 1904 "supplemented and completed the decree granted on the 25th August, 1900 and for the first time gave to the plaintiff that which alone would justify him in applying for the joint execution to which he was entitled". Viewed in this light the decree which the decree-holder in that case was executing was an incomplete decree of the 25th August, 1900, completed by the decree passed on 16th November, 1904, and time was calculated from the date when the Court granted a complete decree to the decree-holder. In the present case the decree-holder had obtained a complete executable decree on the date of the final decree. Speaking with the greatest respect I do not think the decision of the Privy Council in *Ashfaq Husain* v. *Gauri Sahai*[1] has been correctly applied by the learned Judges of the Patna High

1. (1911) L. R. 38 I. A. 37: I. L. R. 33 All. 264: 21 M. L. J. 1140 (P. C.).

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Court in *Somar Singh* v. *Deonandan Prasad Singh*[1]. Now coming to the first ground, no doubt the wording of the clause as it stands supports the conclusion arrived at by the learned Judges. But I think it is wrong to interpret the clause in this way ignoring the context in which it appears. There can be no doubt that under the first clause the period for the execution of a decree is three years " from the date of the decree or order". This clearly means from the date of the decree or order that is sought to be executed. Then comes cl. (2) which says, " (where there has been an appeal) the date of the final decree or order . . . ". Appeal from what decree or order? Surely, appeal from the decree or order sought to be executed. This seems to me to be the only interpretation possible having regard to the context in which the clause stands. In the present case there has been no appeal against the final decree which is the decree sought to be executed and, therefore, time should be computed from the date of the final decree. It was argued for the respondent that the final decree is imperilled by the appeal preferred against the preliminary decree and in case of his success in the appeal the final decree will have to be altered. True; but nothing stands in the way of the party concerned applying for the passing of a fresh final decree in accordance with the appellate decree; and this I believe is what is generally done when after the passing of a final decree by the first Court during the pendency of the appeal the appellate Court ultimately interfered with the preliminary decree. I am not satisfied that there is much substance in the argument that the final decree is imperilled by the decree that may be passed by the appellate Court in the appeal against the preliminary decree, and that, therefore, the time should be calculated only from the date of the appellate decree.

Mr. Kuttikrishna Menon on behalf of the appellant has brought to my notice various cases, such as, *Fakir Chand Mandal* v. *Daiba Charan Parni*[2], *Profulla Kumar Basu* v. *Mt. Sorojbala Basu*[3], *Jivaji* v. *Ramchandra*[4], *Sheo Prasad* v. *Anrud Singh*[5], *Narsingh Sewak Singh* v. *Madho Das*[6] and *Mulkh Raj* v. *Gurdittah Shah Harichand*[7]. Generally stated, in these cases

1. (1927) I. L. R. 6 Pat. 780.
2. (1927) I. L. R. 54 Cal. 1052.
3. A. I. R. 1931 Cal. 332 at 334
4. (1891) I.L.R. 16 Bom. 123.
5. (1879) I. L. R. 2 All. 273.
6. (1882) I. L. R. 4 All. 274.
7. A. I. R. 1929 Lah. 283.

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it was held that appeals from orders refusing to set aside *ex parte* decrees are not to be regarded as appeals from the decrees themselves and therefore cannot be availed of by the decree-holder to save his application to execute the decree from the bar of limitation under Article 182, clause (2). These cases do not apply to the present case inasmuch as there were no appeals in these cases against the decrees sought to be executed.

For the above reasons, I am of opinion that in the present case the period of limitation should not be computed from the date of the High Court's decree on 20th March, 1923, but should be computed from the date of the final decree on 30th September, 1919. I think this conclusion follows from a true interpretation of Article 182, clause (2) of the Limitation Act having regard to its context.

The next question is whether time can be computed in this case from the date of the amended decree. Article 182, clause (4) prescribes "(where the decree has been amended), the date of amendment" as the starting point for limitation. Here again, if you rely merely on the express language of the clause the respondent's contention should be upheld. In the present case before the amendment the decree had become admittedly barred. If the literal construction of Article 182, clause (4) is to be accepted, then it would enable the decree-holder to execute a barred decree, but I cannot believe that this result was intended by the legislature to follow from this provision. In *Rabiuddin* v. *Ram Kanai Sen*[1] it was held that "a decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment." To the same effect is the decision in *Jhamman Lal* v. *Daulat Ram*[2]. As against these decisions Mr. Govinda Menon for the respondent relies upon the following observations in *Durga Prasad Das* v. *Kedarnath Nayek*[3] in support of his contention that the starting point of limitation is the date of the amended decree:

"Where the legislature has provided that the time from which period of limitation for execution of a decree should begin to run where a decree has been amended, is the date of amendment, it is not for the Court of execution to enquire whether the amendment was properly made, whether the original

1. (1920) 59 I. C. 186.
2. A. I. R. 1924 Lah. 329. 3. A. I. R. 1929 Cal. 650.

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decree was capable of execution or whether for any other reason the Court was wrong in making the order for amendment of the decree."

I agree that it is not the duty of an executing Court to consider whether the amendment has been properly made, but it has to decide whether the application is barred by limitation or not. I do not think it is necessary to discuss this decision any further as it runs counter to the previous decision of the Calcutta High Court itself, *Rabiuddin* v. *Ram Kanai Sen*[1], already noticed; and as in that case when the application which was said to have been barred was filed, there was already an execution application pending which was within time. The final decree in the case was made on the 8th May, 1924 and the first application for execution was filed on the 7th May, 1927. In the course of narrating the facts of the case the learned Judges say, "It is unnecessary to mention that the execution was asked for of the amended decree in continuation of the application presented in Court on the 7th May, 1927." In this view the learned Judges' conclusion that the execution application was not barred by limitation seems unobjectionable whatever may be said against their observations quoted above. In my opinion a decree which has already become barred by limitation cannot be revived for purposes of execution by a subsequent amendment. I must not fail here to point out that the appellant's learned counsel objects to the respondent relying on the amended decree for the reason that no notice was given to his client at the time when the amendment was made. The amendment of the decree was not relied on in the first Court as a ground for saying that the applications for execution were not barred by limitation. The point was taken for the first time in the appellate Court and the learned Judge has not anywhere in his judgment stated that notice of amendment was or was not sent to the appellant. In the view I take that the amended decree cannot in the present case form the starting point for limitation there is no need for considering whether the notice of amendment was as a matter of fact sent to the appellant and if not whether the amended decree can be relied on to save limitation.

In the result I set aside the decision of the Lower Court and restore that of the District Munsif with costs here and in the Court below.

K. C. *Appeal allowed.*

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1. (1920) 59 I. C. 186.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE RAMESAM, MR. JUSTICE SUNDARAM CHETTY, MR. JUSTICE PAKENHAM WALSH AND MR. JUSTICE BURN.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The Madura Hindu Permanent Fund, Ltd. .. *Respondent.*

F. B.

The Commissioner of Income-tax, Madras *v.* The Madura Hindu Permanent Fund, Ltd.

Income-tax Act (XI of 1922), Ss. 3 and 10 (2) (iii) and Explanation—Fund registered as Company—Capital consisting of recurring subscriptions—"Guaranteed interest" paid thereon by Fund, if taxable as profits—Applicability of Styles' case—Subscriptions, if borrowed capital.

The Madura Hindu Permanent Fund was incorporated as a limited company under the Companies Act of 1882. Its objects were stated to be (*a*) to enable persons to save money; (*b*) to invest their savings in landed property and Government promissory notes; (*c*) to secure loans at favourable rates of interest and to grant loans on sound securities The capital of the Fund was contributed by two classes of subscribers at the rate of Re. 1 per mensem per share, the *A* class subscriber for 45 months, the *B* class subscriber for 84 months. At the end of the period, the former was paid off Rs. 50, the latter Rs. 102-8-0, and the account was closed. The amount so paid to the subscribers in excess of their subscriptions was called "guaranteed interest" which the Fund claimed to be entitled to deduct from its income in computing its taxable profits. It was assumed for the purpose of the reference that the transactions of the Fund were confined to its members though the rules provided for loans also to non-subscribers and to registered Co-operative Societies.

Held, (*i*) that the ruling in *The New York Life Insurance Company* v. *Styles*, (1889) 14 A. C. 381, had no application to the facts of the case, because it dealt with only a surplus of the premium originally subscribed by the shareholder over the sum actually utilised for the common purpose and there was no payment or receipt of interest. In the present case, on the other hand, the guaranteed interest was interest earned and constituted a part of the profits.

Obiter: The decisions in *The Board of Revenue* v. *Mylapore Hindu Permanent Fund*, (1923) I. L. R. 47 Mad. 1 (S. B.) and *The English and Scottish Co-operative Society* v. *Commissioner of Income-tax*, (1929) 3 I. T. C. 385, were erroneously based on *Styles' case* which had, in fact, no application to those cases, though they could not be said to have been wrongly decided.

(*ii*) that the Fund was not really a Company, the amount of recurring subscriptions paid periodically by the shareholders or subscribers was not share capital or borrowed capital as ordinarily understood. It was something different from both, but in view of the Explanation to S 10 (2) (*iii*) of the Income-tax Act, it should be *deemed* a borrowing of capital. It partook the nature of a loan on which the Fund contracted to pay a fixed interest which, not being in any way dependent on the earning of profits, could be deducted from the profits and gains of the Association under S. 10 (2) (*iii*) of the Act.

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*O. P. No. 243 of 1931. 28th September, 1932.

F. B.

The Commissioner of Income-tax, Madras v. The Madura Hindu Permanent Fund, Ltd.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act (hereinafter referred to as the Act).

2. The Madura Hindu Permanent Fund, Ltd. (hereinafter referred to as the Fund) is a company registered under the Indian Companies Act. A copy of its Memorandum and Articles of Association is appended—Exhibit A.

3. The objects of the Fund are (Clause 3 of the Memorandum of Association):—

(*a*) to enable persons to save money;

(*b*) to invest their savings in landed property and Government promissory notes;

(*c*) to secure loans at favourable rates of interest and to grant loans to the societies registered under the Co-operative Credit Societies Act . . . and

(*d*) to do all such other things as are incidental or conducive to the attainment of the above objects.

4. The nominal capital of the company is Rs. 30,00,000 divided into 25,000 shares of Rs. 84 in 'B' class and 20,000 shares of Rs. 45 each in 'A' class.

There are three classes of subscribers to the Fund: 'A,' 'B' and 'C'. 'A' class subscribers pay a monthly subscription at the rate of Re. 1 per share for 45 months. 'B' class subscribers pay at the same rate for 84 months. These two classes of subscribers form the shareholders of the Fund though no share certificates are issued to them. 'C' class subscribers do not pay a monthly subscription but pay a single fee of Rs. 2 at the time of admission. Subscribers of this class are not entitled to share in the profits, and cease to be members when the loans taken by them are discharged, or, if they have not taken any loans, on the expiry of 3 years from the date of their admission. (Art. 3.)

5. The share account of an 'A' class subscriber is closed on the expiry of 45 months by his being paid Rs. 50 and that of a 'B' class subscriber on the expiry of 84 months by his being paid Rs. 102-8-0. The difference between the amount returned to him at the end of the stipulated period, *viz*., Rs. 5 in the case of an 'A' class subscriber and Rs. 18-8-0 in the case of a 'B' class subscriber is called the guaranteed interest. The amount paid as such interest during the year of account came to Rs. 68,462-13-3.

These two classes of subscribers are also entitled to be paid profits, if on an annual settlement of the accounts, the Fund has made any profits. (Arts. 9 and 49.)

F. B.

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6. Fixed and Current Deposits may be received from any one whether a subscriber or not. (Art. 45.)

7. The Fund grants four kinds of loans: Simple loans, ordinary mortgage loans, loans with personal sureties and extra-ordinary loans. The first three kinds of loans are granted only to *A* and *B* class subscribers and the fourth kind to all classes of subscribers [Art. 10 (*a*) to (*d*)]. The total of loans outstanding at the end of the year of account was Rs. 11,11,263. Of this sum Rs. 10,72,748 represented loans to *A* and *B* class subscribers and Rs. 38,515 represented loans to *C* class subscribers. Thus one of the loans outstanding at the end of the year were advanced to persons who were not subscribers.

Loans may also be granted to non-subscribers on the security of their deposits [Art. 10 (2) (*c*)] and to Co-operative Societies [Art. 10 (3)]. The Fund states (and it is not disputed by the Department):

(1) that no loans have ever been granted to Co-operative Societies, and

(2) that as it has a considerable surplus on its hands the Fund has not been receiving fixed deposits and that consequently there have been no loans to non-subscribers.

8. The profits are to be arrived at after setting aside what is due to the subscribers in the shape of principal and interest. After setting aside one-eighth of the surplus to a Reserve Fund the balance is to be divided between the subscribers (*i. e.*, *A* and *B* class) and the Directors in the proportion of 3: 1 (Art. 49). The profits are to be distributed to the subscribers with reference to the number of shares held by them and the number of months during which they have held them (Art. 49).

9. The Fund received the following income during the year of account ended 20th January, 1930 (which is the year of account relating to the assessment of the year, 1930—1931, the assessment which is now in question):—

From 'A' and 'B' class subscribers	.. Rs. 84,205-14-2 (made up of interest on loans, admission fees and miscellaneous fees).
From 'C' class subscribers	.. Rs. 2,808-4-8 (made up of interest and miscellaneous fees).
From others	.. Rs. 12,698-8-0 (interest from Banks; interest

	on closed and decree accounts, etc.).
House rent	.. Rs. 1,194-14-0.
Total Rs.	1,00,907-8-10

The expenditure side of the profit and loss statement shows the following items:—

	Rs.	A.	P.
Guaranteed interest to 'A' and 'B' class subscribers ..	68,462	13	3
Interest paid to 'A' and 'B' class subscribers on Fixed Deposits ..	6	9	3
Interest paid on moneys deposited by employees as security and on moneys belonging to the Establishment Provident Fund ..	850	14	3
Interest paid to non-subscribers (on amounts due to them but kept in the Fund pending the furnishing by them of proper security) ..	139	12	0
Establishment ..	10,308	5	1
Contingencies ..	6,790	13	10
Total Rs.	86,559	3	8

The net profit according to the profit and loss statement was Rs. 14,348-5-2.

10. For the assessment of the year 1930—1931, the Fund returned a profit of Rs. 14,348 accordingly. In arriving at this figure the Fund deducted from its earnings the 'guaranteed interest' amounting to Rs. 68,462-13-3 which it had paid to its shareholders 'A' class and 'B' class. The Income-tax Officer examined the question whether the Fund was a mutual benefit society and came to the conclusion that it was not. His reasons were that the Fund dealt with a class of shareholders, *viz.*, the 'C' class, who did not subscribe any capital and did not share in the profits and that its by-laws provided for loans to other 'outsiders' as well, *viz.*, non-subscribers and Co-operative Societies. He held that there was no reason to confine the assessment to income from 'outside' and proceeded to compute the profits as in the case of an ordinary trading concern.

In arriving at the net figure of profits he held that the payment of the guaranteed interest to 'A' and 'B' class subscribers was merely a division of profits and that the interest was therefore

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not a deduction admissible under the Act. He accordingly added this amount to the income returned and after making certain other adjustments determined the total income to be Rs. 84,520 and levied tax accordingly.

11. The Fund's appeal to the Assistant Commissioner was unsuccessful.

12. The Fund now requires me to refer to the High Court various questions of law said to arise out of the order passed under S. 31 of the Act. In the form in which they are framed these questions are not suitable for reference. The matters in dispute are covered by the two questions which I have framed below. I have not raised the question whether this Fund is a "Mutual Benefit Society" because that expression has no well-defined meaning and no answer to the question would be of material assistance. Moreover, no such question has been framed in the application for reference.

The Income-tax Officer has based his decision in this case mainly on the existence of the 'C' class subscribers, who become entitled to loans but hold no shares in the Fund. It appears to me that this distinction between the shareholder and the non-shareholder is not fundamental and that broader issues are involved. The Fund may alter its rules (and I understand has altered them) so as to make it compulsory for 'C' class subscribers to become shareholders, and these broader issues would still have to be faced, not only in this case but also in dealing with other similar Funds. In my opinion there are two questions here arising for decision, although the second of these does not arise if an affirmative answer is given to the first. These questions, which are as follows, I refer accordingly for the decision of their Lordships :—

Q. I.—Are the facts of this case such that the ruling in *The New York Life Insurance Company* v. *Styles*[1] can be applied to them?

Q. II.—If the Fund is conducting a business and making a profit, is the "guaranteed interest" to be deducted in computing that profit as being "interest on borrowed capital" within the meaning of section 10 (2) (*iii*) of the Act ?

My opinion on these questions is as follows:—

Question I.—I wish to begin by admitting that the facts of this case bear a very close resemblance to those which were considered in the case of *The Secretary, Board of Revenue* v. *The Mylapore Hindu Permanent Fund, Ltd.*[2] In that case the question referred for decision was Question No. II above, but the finding of the Court amounted to a decision on Question No. I, which had not been

1. (1889) 14 A.C. 381: 2 T. C. 460.
2. (1923) I. L. R. 47 M. 1: 1 I. T. C. 217 (S.B.).

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referred and stated and this finding was of such a nature that it precluded consideration of Question No. II. In these circumstances I respectfully suggest that a further and perhaps final pronouncement on this type of case is necessary; and I venture to request the Court to consider the facts afresh and not to regard this case as concluded by the decision in the *Mylapore case*[1].

The facts in the case of *The Trichinopoly-Tennore Hindu Permanent Fund, Ltd.* v. *The Commissioner of Income-tax*[2] were found to differ markedly from those of the *Mylapore Fund case*[1]. Nevertheless, I hope to show that in this case, as in the *Trichinopoly case*[2], the facts establish the existence of a profit-making concern, and that the decision then arrived at is directly applicable here.

The question, then, is whether the element of "mutuality," as it has been called, which was found to present itself in certain of the transactions of the New York Life Insurance Company (not of course in that Company's business as a whole) can be traced in the facts of the case now before the Court It was found in the *New York case*[3], if I may recapitulate the facts very briefly, that a certain number of people had combined their funds for the purpose of mutual insurance, and that what was claimed to be profit was merely the amount by which the total sum subscribed exceeded the total sum actually utilised for the common purpose. This surplus, it was found, was not a profit, because it resolved itself into sums contributed for a common purpose and returned to the contributors as being no longer required for that purpose. Thus there was no element of profit at any stage in these transactions. And in particular, it may be noted, that there was no payment or receipt of interest.

Now it is suggested that the transactions of the Madura Hindu Permanent Fund are of a similar character because all loans are in practice advanced (although the Fund is legally empowered to grant loans otherwise) to the shareholders who constitute the members and proprietors of the Fund. The existence of 'C' class subscribers, who are borrowers but not shareholders, is here a disturbing factor, but, as I have already indicated, it should not, in my opinion, be made a deciding factor in the case Leaving this aside for the moment, and assuming that all loans are made to members of the Fund, it is said that because money is borrowed from the Fund by the very people (or some of them) whose contributions have formed the Fund, the interest which the Fund as a whole derives from the

1. (1923) I. L. R. 47 Mad. 1: 1 I. T. C. 217 (S. B.).
2. (1927) 53 M. L. J. 831: 2 I. T. C. 386 (F.B.).
3. (1889) 14 A. C. 381: 2 T. C. 460.

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borrowers is an "earning from within" and is akin to the surplus which was the subject of the decision in the *New York case*.[1]

It is necessary, therefore, to repeat that that surplus was not an "earning" at all. It was not found that the Company had made a profit which was exempt from taxation because it was "earned from within". It was found, on the contrary, that so far as certain specific transactions were concerned no profit was either intended to arise or had in fact arisen. That is a very different thing from saying that when a body of persons lends money to one of its members, the interest paid on the loan is not profit, or being profit is by reason of its origin exempt from income-tax.

In the facts of this case the element of profits is conspicuous throughout. The object of the Fund considered as a body is clearly profit. It carries on an ordinary banking business, and the interest which it earns is ordinary bankers' profit. The profit does not cease to be a profit because it is made by the Fund as a body trading with its individual members. Similarly, the member who invests his money in the Fund does so primarily with a view to the profit which comes to him partly in the shape of guaranteed interest. and partly in the shape of dividends. It is from his point of view an ordinary earning investment. There is no question of his money being contributed for expenditure on a common purpose, and of only so much being returned to him as is not found to be required for that purpose. On the contrary, the whole of his contribution is returned, and with it an additional sum which, in my opinion, (as will appear later) is merely a dividend under another name, but which in any case is certainly a profit accruing to him, and not a mere refund.

Again, it is instructive to consider more closely the object with which the subscriptions were made. In each case it may be said that there was a common purpose, and that the object of the subscriptions was to establish a fund to be used for that purpose. But here the resemblance ceases, and the differences are far more significant. In the *New York case*[1] the money was intended to be ***spent*** for the common purpose, which was that of providing insurance benefits. Here there is no intention of spending the money—the intention is to lay it out at a profit.

My view, therefore, is that the facts of this case bear no resemblance to those of the *New York Life Insurance Company's case*[1], the distinguishing feature being that whereas the transactions of the company, which were considered in that case, were transactions into

1. (1889) 14 A. C. 381 : 2 T. C. 460.

which the element of profit did not enter, the element of profit is here present in one of its most obvious forms—in the form of interest on loans.

I therefore submit that this question should be answered in the negative.

Question II.—If it is correct to describe the transactions of the Fund as a banking and money-lending business carried on with a view to profit, the further question arises which was put but not answered in the *Mylapore Fund case*[1], *viz.*, whether the sum paid to "A" and "B" class subscribers in the shape of "guaranteed interest," amounting here to Rs. 68,463, was expenditure incurred for the purpose of earning that profit or was part of the profit itself. It is claimed as expenditure on the ground that the money supplied to the Fund by these subscribers, which is undoubtedly used by the Fund as its money-lending capital, is "borrowed capital" within the meaning of S. 10 (2) (*iii*). Now this money represents the working capital of the Fund. It has no other capital. This capital is, no doubt, a fluctuating sum, and the individual subscriptions which compose it are not placed permanently in the Fund, but are returnable to the members along with the guaranteed interest. The inference from these facts which is suggested on behalf of the Fund is that the Fund has no capital of its own, and that the money which it lends out is "borrowed" from the individual members. But in view of the terms of the Memorandum and Articles of Association of the Fund I do not think it can be said that the Fund has no capital. The Memorandum and Articles provide for the raising of capital which may amount to 30 lakhs of rupees. The capital is contributed by members in the form of subscriptions (not loans or deposits). The subscriptions are refundable in due course, but so long as they are in the Fund's possession they are the capital of the Fund contributed by its members, and are not borrowed money. Presumably if a liquidation of the Fund were to take place, the members would not rank as creditors, in respect of these contributions, on the same footing as "outside" creditors, but would merely be entitled to share what remained of the assets after these creditors had been satisfied.

Turning to the other side of the question, the profits made by the Fund are distributed in the shape of (*a*) guaranteed interest, and (*b*) dividends. The guaranteed interest comes from the same source as the dividends, *viz.*, in the main from interest on money lent out by the Fund. Both alike represent profits of the Fund, though the principle of distribution is different. The guaranteed

1. (1923) I. L. R. 47 Mad. 1: 1 I. T. C. 217 (S. B.).

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interest is perhaps comparable to the dividend paid by an ordinary Company on its preference shares. The fact that the profit is distributed in this form does not alter its character of profits.

In my opinion, therefore, this question also should be answered in the negative.

M. Patanjali Sastri for petitioner.

S. Srinivasa Aiyangar for *K. Rajah Aiyar* for respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This reference by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Income-tax Act (XI of 1922) has arisen out of an assessment to income-tax of the profits of the Madura Hindu Permanent Fund, Limited. This Fund was incorporated as a limited company in 1894 under the Indian Companies Act (VI of 1882). Its Memorandum of Association shows that the objects of the Fund are:

(*a*) to enable persons to save money;

(*b*) to invest their savings in landed property and Government promissory notes;

(*c*) to secure loans at favourable rates of interest and to grant loans on sound securities; to grant loans to societies registered under the Co-operative Credit Societies Act; and

(*d*) to do all such other things as are incidental or conducive to the attainment of the above objects.

The nominal capital of the Fund at its inception was stated to be Rs. 2,99,964 divided into 3,571 shares of Rs. 84 each to be paid in monthly instalments of one rupee. This was raised in 1896 and again in 1902 by the addition of further shares of the same denomination. In 1906 a new class of shares of Rs. 45 each was introduced, and in 1909, 1914, 1915, 1923, 1927 and 1929 the numbers of the shares in both classes were raised until in the last year the capital was stated to be Rs. 38,70,000 divided into 30,000 shares of Rs. 84 each ('B' class shares) and 30,000 shares of Rs. 45 each ('A' class shares).

The capital of the Fund is contributed by these 'A' and 'B' class subscribers at the rate of Re. 1 per mensem per share. The subscribers in 'A' class go on paying their subscriptions for 45 months and those in 'B' class for 84 months. As soon as 'A' class subscriber has paid Rs. 45 for one share in this manner, his account, in so far as that particular share is concerned, is closed, and he is paid off with a sum of Rs. 50. A 'B' class

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subscriber is paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to 'A' and 'B' class subscribers in excess of their subscriptions to the Fund are called "guaranteed interest".

During the year of account (ending with the 20th January, 1930) there was also a third class of subscribers ('C' class). These subscribers did not pay any periodical contributions but paid a subscription of Rs. 2 on entry into the Fund. They had no share in the profits but were entitled to obtain loans from the Fund and their accounts were closed when they repaid their loans or at the expiry of three years from the date of admission if they did not take any loan. For the purpose of this reference it is not necessary to take into account the existence of these subscribers in 'C' class.

The rules make provision for the receipt of fixed and current deposits from any person, whether a subscriber to the Fund or not. The rules also make provision for the grant of loans not only to subscribers but also to non-subscribers and to registered Co-operative Societies. But in fact no fixed deposits have been received, and no loans have been made either to non-subscribers or to Co-operative Societies. The reference has therefore been made, and falls to be dealt with, on the assumption that all the transactions of the Fund are with its own members. It is the members of the Fund who subscribe the capital, and it is to the members of the Fund that the subscribed capital is lent.

During the year of account the Fund received a total income of Rs. 1,00,907-8-10 made up as follows:—

		Rs.	A.	P.
From 'A' and 'B' class subscribers	..	84,205	14	2
,, 'C' class subscribers	..	2,808	4	8
,, others	..	12,698	8	0
House rent	..	1,194	14	0

From this the Fund claimed to be entitled to deduct Rs. 86,559-3-8 made up as follows:—

		Rs.	A.	P.
Guaranteed interest to 'A' and 'B' class subscribers	..	68,462	13	3
Interest paid to 'A' and 'B' class subscribers on Fixed Deposits	..	6	9	3

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	Rs.	A.	P.
Interest paid on security deposits and Provident Fund	850	14	3
Interest paid to non-subscribers ..	139	12	0
Establishment ..	10,308	5	1
Contingencies ..	6,790	13	10

This left a net profit according to the Fund of Rs. 14,348-5-2, and that figure was returned to the Income-tax Officer. The Income-tax Officer made certain minor adjustments. He allowed in the main all the items of expenditure except the item of Rs. 68,462-13-3. He held that this was a profit earned during the year and therefore liable to be assessed to income-tax. His decision was based mainly upon the point that the Fund had dealings with 'C' class shareholders who were not subscribers of capital and not sharers in the profits. He was influenced also by the fact that according to the by-laws loans could be made to persons who were not members of the Fund and to Co-operative Societies. As already indicated, these circumstances have to be left out of account in dealing with this reference.

The Fund appealed to the Assistant Commissioner of Income-tax and the appeal was dismissed. The Fund thereupon applied to the Commissioner of Income-tax to make a reference to this Court under S. 66 (2) of the Income-tax Act. The Commissioner considers, agreeing with the Income-tax Officer and the Assistant Commissioner, that this amount of Rs. 68,000 distributed in the shape of "guaranteed interest" forms part of the profit earned by the Fund, (by trading with its own members), and that this would be assessable to income-tax if it were not for the decision of this Court in the *Mylapore Fund case*[1]. The Commissioner admits that the facts of the present case are very similar to those of the *Mylapore Fund case*[1], and as the decision in the *Mylapore Fund case*[1] was based upon the case of *The New York Life Insurance Co.* v. *Styles*[2] he has framed the questions which he desires to refer in the following form:—

Question I.—Are the facts of this case such that the ruling in *The New York Life Insurance Company* v. *Styles*[2] can be applied to them?

Question II.—If the Fund is conducting a business and making a profit, is the "guaranteed interest" to be deducted in computing that profit as being

1. (1923) I. L. R. 47 Mad. 1 : 1 I. T. C. 217 (S.B.).
2. (1889) 14 A. C. 381 : 2 T. C. 460.

"interest on borrowed capital" within the meaning of S. 10 (2) (*iii*) of the Act?

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With regard to the first question what were the facts in *The New York Life Insurance Company* v. *Styles*[1]? They were that the life insurance Company had no shares or shareholders. The only members were the holders of participating policies, each of whom was entitled to a share of the assets and liable to all losses. A calculation was made by the Company of the probable death-rate among the members and of the probable expenses and other liabilities, and the amount claimed for premiums from members was commensurate therewith. An account was annually taken and the greater part of the surplus of such premiums over expenditure referable to these policies was returned to the policy-holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of members. It was admitted that the income derived by the Company from investments and from all transactions with persons not members, was assessable to income-tax. It was held by Lords Watson, Bramwell, Herschell and Macnaghten, Lord Halsbury, L. C. and Lord FitzGerald dissenting, that no part of the premium income received under participating policies was liable to be assessed to income-tax as profits or gains under Schedule D. Lord Halsbury, L. C. and Lord FitzGerald held that the surplus returned or credited to members was liable to income-tax. In this case the majority of their Lordships distinguished the case from *Last* v. *London Assurance Corporation*[2] the income in that case being derived from transactions with persons not members and not from mutual insurance between members only. That is what the headnote to *Styles' case*[1] states. Lord Watson on page 393 says:

"The main and to my mind essential difference between *Last's case*[2] and the present, consists in the fact that in this case the policy-holders are not outsiders, because they, and they alone, are members of the company. In *Last's case*[2] the insured and the corporation stood to each other in no other relation than that of creditor and debtor; they were in all respects separate and independent bodies, without community of rights and interests, their sole connection being a right on the one part to pay premiums, with a counter obligation, when these had been duly settled, to pay the sum insured"

and on page 394:

"When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all

1. (1889) 14 A. C. 381: 2 T. C. 460. 2. (1885) 10 A. C. 438.

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of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies."

On page 396 Lord Bramwell states with reference to the facts in *Last* v. *London Assurance Corporation*[1] as follows:—

"I understand the principle of that decision to be, that there was a Company making profits, meaning to make profits, not from its own members, but from those it dealt with; that although it returned two-thirds of those profits to those it dealt with, they were not the less profits, and that therefore income-tax was payable on them. I thought, and still think, that wrong. I thought that the profits were only what remained, after the return they had agreed to make, on what was divisible among the shareholders. But whichever opinion is right, and it must be taken that the opinion of the majority was, it seems clear that it does not govern this case. There were in that case two bodies, the shareholders and the assured. The object of the former was to make profits in dealing with the latter, and as much profit as they could, giving them no better terms than were necessary to attract business. Here there is one body only, the assured, who are not dealing with another body, and are not to make profits, but to insure themselves and each other on terms as low as can be consistent with safety and solvency. In that case it was the insurers who were taxed; in this it is the assured. I think the cases wholly different."

On page 411 Lord Macnaghten says:

"Certain persons agree to insure their lives among themselves, on the principle of mutual insurance. They take care to admit none but healthy lives. They contribute according to rates fixed by approved tables, and they invite other persons to come in and join them by insuring their lives on similar terms. The rates fixed by the tables are taken as being sufficient to provide for expenses, to meet liabilities, and to leave a margin for contingencies. What is to become of the surplus if everything goes right? The practice is to take an account every year of assets and liabilities, and to give the insured the benefit of the surplus, either by way of reduction of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied, or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors. I do not understand how persons contributing to a common fund in pursuance of a scheme for their mutual benefit—having no dealings or relations with any outside body—can be said to have made a profit when they find that they have overcharged themselves, and that some portion of their contributions may be safely refunded. If profit can be made in that way, there is a field for profitable enterprise, capable, I suppose, of indefinite expansion."

At the bottom of page 412 he continues:

"I do not think that that decision (*Last* v. *London Assurance Corporation*)[1] compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons who

1. (1885) 10 A. C. 438.

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contribute in the first instance more than is wanted, and then get back the difference, are earning gains or profits, and so liable to income-tax."

On page 410 Lord Herschell says:

"Once shew that profits are made by trading and they are taxable, whatever the purpose to which they may be applied. But in the present case I cannot see that the income sought to be taxed is profit arising from trading."

It is obvious that in one respect—and it certainly is an important one—the facts of this case differ from those in *The New York Life Insurance Co.* v. *Styles*[1]. In the latter case the fund sought to be taxed was the surplus arising out of an over-estimate. It was nothing that had been earned. A member who paid a premium of £50 got back not more than the £50 contributed by him either by means of a cash bonus or by reduction of premium. Their Lordships in that case were therefore dealing only with a surplus. Here the facts are quite different because the guaranteed interest is certainly interest which has been earned. *The New York Life Insurance Co.* v. *Styles*[1] therefore can have no application here; nor could the decision in *The Board of Revenue* v. *The Mylapore Hindu Permanent Fund*[2] case have been rightly based upon it. The only support that it gives to that case are the observations of Lord Bramwell, Lord Watson and Lord Macnaghten and Lord Herschell—where the fact that the business was a mutual undertaking pure and simple was so strongly emphasised. *Styles' case* was also the basis of this High Court's decision in *English and Scottish Co-operative Society* v. *Commissioner of Income-tax*[3]. It is not necessary to refer to the facts of that case because the point for consideration is shortly set out in the concluding portion of Odgers, J.'s judgment as follows:—

"If therefore this return of interest on the share capital to the persons called shareholders, namely, the Co-operative Wholesale Society and the Scottish Co-operative Wholesale Society, is simply, as it appears to be and as is sworn by the affidavit of Sir Fairless Barber, merely a return on the amount of its subscribed capital or a handing back of a portion of the amount subscribed and in no sense a dividend on the profits earned by the Company, then I think it falls within the ambit of *Styles' case*[1]; and if that is so, it is simply a return in another form of the rateable dividend in R. 20 (*e*). It is clearly not a division of profits in the ordinary sense but is purely notional, for we are told that no money changes hands. This notional profit is calculated on the difference between the market price of the com-

1. (1889) 14 A. C. 381: 2 T. C. 460.
2. (1923) I. L. R. 47 Mad. 1: 1 I. T. C. 217 (S. B.).
3. (1929) 3 I. T. C. 385.

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modities at the time they are distributed to the members of this Society and the actual cost of their production to the Society when ascertained. This so-called profit is distributed in the six ways provided for by R. 20 and on this so-called profit after allowing for depreciation, interest is to be paid on the share capital, *i.e.*, to the only two members of the Society in proportion to their contributions to the capital. I am unable to see on the facts of this case as disclosed in the rules and on the only evidence we have, namely, the affidavit of Sir Fairless Barber, any evidence of a profit being made by sales to persons outside the membership of the Society. There is no evidence as stated above that any other societies except the two named in R. 5 have been admitted to membership. It seems to me that this is a case of a purely mutual concern. We know that the whole of the produce raised and exported by the Association is in fact divided among these two members."

I think that it is hardly right to say that *The New York Life Insurance Co.* v. *Styles*[1] governed either of the two cases referred to—and it does not govern this case—although the observations made by their Lordships in their judgment certainly support the result arrived at in both. I am not disposed to say therefore that those two cases were wrongly decided although, in my opinion, *The New York Life Insurance Co.* v. *Styles*[1] does not govern them. I would answer Question No. I in that way although, in my opinion, it is not necessary here to consider the effect of the ruling in *The New York Life Insurance Co.* v. *Styles*[1] or the two income-tax decisions of this High Court to which reference has already been made because I think that this question can be answered favourably to the assessees in Question No. II for reasons which I will now give. Of course if no profit has been earned, then no question of deductions under S. 10 (2) (*iii*) of the Indian Income-tax Act arises. But on the assumption that the assessees have earned a profit, I will proceed to the consideration of Question No. II. Is this guaranteed interest interest on capital borrowed for the purposes of the business where the payment of interest thereon is not in any way dependent on the earning of profits? For the Income-tax Commissioner it is contended that this guaranteed interest is interest on share capital, that interest on share capital must always be dependent upon its being earned by profits being made and that it is not capital borrowed for the purposes of the business within S. 10 (2) (*iii*) of the Indian Income-tax Act. It is to be observed that by cl. (5) of the Memorandum of Association there is to be a nominal capital divided into shares and it is further argued that there is here a share capital, that the proprietors of the shares are sharehold-

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1. (1889) 14 A. C. 381: 2 T. C. 460.

ers and that the interest earned is profit made by the assessees. On the other hand the contention of the assessees is that this is not really share-capital at all but subscription-capital raised by recurring subscriptions paid periodically by the shareholders or subscribers, that the shareholders or subscribers are creditors of the Company and that as they must under the Articles of Association be repaid the accumulated subscriptions *plus* the guaranteed interest at the end of the specified period, these subscriptions cannot really be share-capital, although so described and of course a shareholder cannot demand repayment of his share-capital. The Income-tax Commissioner meets this point with the argument that the provision for the return to the shareholders of the amounts contributed by them is *ultra vires* because this Fund has chosen to get itself registered under the Indian Companies Act and it is therefore a Company and it must have capital and it is repugnant to the provisions of the Indian Companies Act for the capital of the registered Companies to be returned to its shareholders. Capital, of course, can be reduced but only with the sanction of the Court. In my opinion, the fact that the Fund is registered under the Indian Companies Act and is subject to its provisions is not by any means conclusive of a question which arises under the Indian Income-tax Act. The fact is that the machineries of the Indian Companies Act cannot be in its entirety adopted to a Fund such as this. This Fund and many similar are not really companies but Mutual Benefit Societies with a fluctuating capital dependent entirely upon the amount subscribed by their members and the repayment of subscriptions *plus* guaranteed interest to the members. The capital is bound to vary from time to time and to say that, whenever this capital is reduced by a repayment to the members, it is necessary to get the sanction of the Court would be to make such funds unworkable. In my opinion, although these subscriptions are called share-capital, they are not really so as that description is understood in its ordinary sense; nor is this capital borrowed for the purpose of the business as that capital is ordinarily understood. It is something different from both. That this is so and that the Legislature recognised the distinction is clearly shown by the Explanation to S. 10 (2) (*iii*) of the Indian Income-tax Act where recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed are to be

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"deemed" to be capital borrowed within the meaning of S. 10 2 (*iii*). If it is "deemed" to be capital borrowed then it is not really capital borrowed but is for the purpose of the Indian Income-tax Act to be so considered. The fact that no Mutual Benefit Societies have as yet been prescribed may be due to various causes with which we are not really here concerned. What we are concerned with is the apparent intention of the Legislature to recognise an association of persons not having share-capital but borrowing and lending from and to themselves for the mutual benefit of themselves. This borrowing is to be deemed to be a borrowing of capital and that being so the interest on it can be deducted from the profits and gains of the Association under S. 10 (2) (*iii*) of the Indian Income-tax Act if the payment of interest upon it is not in any way dependent on the earning of profit. For the Income-tax Commissioner it is argued that if the subscriptions to this Fund are to be treated as capital borrowed for the purpose of the business, the payment of interest upon that capital is dependent upon the earning of profits. If there are no profits, it is argued, there can be no interest; and a Company can only pay interest out of profits and cannot pay interest out of capital. The answer to that contention is that this Fund is really not a Company and that it is not paying interest on its share-capital but is paying a fixed interest to its members or subscribers who occupy the position of lenders to the Fund of sums of money upon which the Fund contracts to pay fixed interest and for which I am of the opinion the lender can sue the Fund in the same manner as any one who has lent money to a partnership or firm at a certain rate of interest could sue that partnership or firm for repayment of the principal and interest. It seems to me, therefore, that the guaranteed interest is interest on capital borrowed for the purpose of the Fund's business and that its payment is not in any way dependent on the earning of profits. I would accordingly answer Question No. II in the affirmative.

Ramesam, J.

Ramesam, J.—I entirely agree with my Lord's judgment. As I delivered the judgment in *The Board of Revenue* v. *The Mylapore Hindu Permanent Fund, Ltd.*[1] it is only proper to add that I also agree with my Lord in thinking that the actual decision in *Styles' case*[2] did not govern the *Mylapore Fund case*[1]

1. (1923) I. L. R. 47 Mad. 1: 1 I. T. C. 217 (S. B.).
2. (1889) 14 A. C. 381: 2 T. C. 460.

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"although the observations made by their Lordships in their judgment certainly support the result arrived at" in the latter case, and that it cannot be said that the case in *The Board of Revenue* v. *The Mylapore Hindu Permanent Fund, Ltd.*[1] was wrongly decided. That case arose under S. 9 of Act VII of 1918.

It is unnecessary now to say how exactly that decision ought to have been put—whether the guaranteed interest payable to subscribers was not "profits" at all within the meaning of S. 9 of Act VII of 1918, or whether the subscriptions paid by the subscribers should be considered to be analogous to borrowed capital. It seems to me that the Legislature considered the decision right and sought to put it on the latter basis by adding the explanation to sub-cl. (*iii*) of S. 10 (2) of the present Act, the sections being otherwise similar. The fact that no Mutual Benefit Societies have been prescribed under the explanation does not, as pointed out by my Lord, prevent us from adopting the construction now adopted.

The assessee will have his costs—which we fix at Rs. 500.

Sundaram Chetty, J.

Sundaram Chetty, J.—I am in entire agreement with the judgment of my Lord, the Chief Justice, and have nothing to add.

Pakenham Walsh, J.

Pakenham Walsh, J.—I agree with my Lord and have nothing to add.

Burn, J.

Burn, J.—I agree with my Lord the Chief Justice.

S. R. *Question I answered in the negative; Question II in the affirmative.*

PRIVY COUNCIL.

[On appeal from the High Court of Australia.]

PRESENT :—LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN AND SIR LANCELOT SANDERSON.

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Alexander Ewan Campbell *v.* Thomas Ernest Rofe.

Alexander Ewan Campbell .. *Appellant**

v.

Thomas Ernest Rofe .. *Respondent.*

Company—Shares—Preference shares—Power of directors to issue without resolution of the Company—Power conferred by Memorandum of Association—Sufficiency of.

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* P. C. Appeal No. 132 of 1931. 28th November, 1932.

1. (1923) I. L. R. 47 Mad. 1: 1 I. T. C. 217 (S. B.).

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While the memorandum must state the amount of capital, divided into shares of a certain fixed amount, provision as to the character of the shares and rights to be attached to them is more properly made by the articles of association, which may be altered from time to time by special resolution of the Company. If equality of the shareholders is expressly provided in the memorandum, that cannot be modified by the articles of association. If nothing is said in the memorandum, the articles of association may provide for the issue of the authorised capital in the form of preference shares; if the articles do not so provide, or do provide for equality *inter socios*, the power to issue preference shares may be obtained by alteration of the articles. If the memorandum prescribes the classes of shares into which the capital is divided and the rights to be attached to such shares respectively, the company has no power to alter that provision by special resolution.

Andrews v. *Gas Meter Company*, (1897) 1 Ch. 361, referred to.

But where the memorandum gives the Company power to issue, *inter alia*, preference shares as part of the original capital and there is no provision or restriction in that respect in the articles which only provide for future issue of new shares, the Company is entitled to exercise the powers expressly conferred on it by the memorandum and to issue part of the original capital as preference shares without a resolution.

Gavin Simonds, K. C. and *J. H. Stamp* for appellant.

Lionel Cohen, K. C. and *C. Radcliffe* for respondent.

28th November, 1932. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This case arises out of the proceedings in the compulsory liquidation of the Marlow-Rolls Theatres, Limited (hereinafter called "the company"), of which the appellant is the official liquidator. The company, which had a brief existence, was incorporated in New South Wales on the 29th December, 1928, and went into liquidation on the 4th September, 1929.

The appellant sought to place the respondent on the list of contributories in respect of 8,000 preference shares allotted to him by the directors of the company on the 12th March, 1929, on the respondent's application therefor, dated the 7th March, 1929. The respondent disputed his liability to be placed on the list of contributories on the ground that no preference shares were ever validly created by the company. There was no resolution of the company creating preference shares, and the sole question in this appeal is whether the directors had power under the Memorandum and Articles of Association of the company to issue these shares to the respondent.

On the 3rd May, 1930, the Master in Equity decided that the respondent was not liable as a contributory; this order was reversed on the 13th October, 1930, by the Supreme Court of

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New South Wales (Harvey, C. J. in Equity), but was restored by the High Court of Australia on the 17th December, 1931, from whose decision the present appeal is taken.

Clause (5) of the Company's Memorandum is as follows:—

"5. The capital of the company is £250,000 divided into 250,000 shares of £1 each, with power to divide the shares in the capital for the time being into several classes and to attach thereto respectively and (*sic*) preferential, deferred, qualified, or special rights, privileges or conditions."

The relevant Articles of Association are as follows:—

"7. The capital is £250,000 and comprises 250,000 shares of £1 each.

"10. The shares shall be under the control of the Directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the Directors think fit and with full power to give to any person the call of any shares either at par or at a premium and for such time and for such consideration as the Directors think fit. The Directors may reserve any of the shares in the original or increased capital of the Company upon such terms as to payment for same and otherwise as they may deem expedient.

"46. The Company in General Meeting may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient.

"48. The new shares shall be issued to such persons and upon such terms and conditions and with such rights and privileges annexed thereto as the General Meeting resolving upon the creation thereof shall direct and if no directions be given as the Directors shall determine and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of the assets of the Company and with a special or without any right of voting.

"50. Except so far as otherwise provided by the conditions of issue (*sic*) or by these presents any capital raised by the creation of new shares shall be considered part of the original capital and shall be subject to the provisions herein contained with reference to the payment of calls and instalments, transfer and transmission, forfeiture, lien, voting and otherwise.

"51. The Company may from time to time by special resolution reduce its capital by paying off capital or cancelling capital which has been lost or is unrepresented by available assets or reducing the liability on the shares or otherwise as may seem expedient and capital may be paid off upon the footing that it may be called up again or otherwise. Provided that should a part of the issued capital at any time consist of preference shares the repayment of such preference share capital shall not be effected unless the holders of at least three-fourths of the preference shares shall so agree.

"117. The management of the business of the Company shall be vested in the Directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them may exercise all such powers and do all such acts and things as may be exercised or done by the Company and are not hereby or by statute expressly directed or required to be exercised or done by the Company in General Meeting but subject nevertheless to the provisions of the Statutes and of these presents and regulations from time to time made by the Company in General Meeting. Provided that no regulations so made shall invalidate any prior act of the Directors which would have been valid if such regulations had not been made.

"118. The Board may from time to time at their discretion raise or borrow or secure the payment of any sum or sums of money for the purposes of the Company.

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"119. The Board may raise or secure the payment or repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit and in particular by the issue of debentures or debenture stock (terminable or perpetual) of the Company charged upon all or any part of the property and assets of the Company (both present and future) including its uncalled and/or unpaid capital for the time being.

"127. Subject to the rights attached to shares issued on special conditions and subject as aforesaid the profits of the Company shall be divisible among the members in proportion to the capital paid up or deemed to be paid up on the shares held by them respectively. Provided that where capital is paid up on any shares in advance of calls upon the footing that the same shall carry interest such capital shall not whilst carrying interest confer a right to participate in profits.

"146. Each holder of registered shares whether preference or ordinary whose registered place of address in not in the Commonwealth of Australia may from time to time notify in writing to the Company an address which shall be deemed his registered place of address within the meaning of these Articles of Association.

"147. As regards those members whether holding preference or ordinary shares who have no registered place of address a notice posted up at the office shall be deemed to be well served on such members at the expiration of twenty-four hours after such posting up.

"154. If the Company shall be wound up and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid-up capital such assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up or deemed to be paid up or which ought to have been paid up at the commencement of the winding up on the shares held by them respectively. And if in a winding up the assets available for distribution among the members shall be more than sufficient to repay the whole of the capital paid up or deemed to be paid up at the commencement of the winding up the excess shall be distributed among the members in proportion to the capital at the commencement of the winding up paid up or deemed to be paid up or which ought to have been paid up on the shares held by them respectively. But this clause is to be without prejudice to the right of the holders of shares issued upon special terms and conditions."

The respondent's application for preference shares was in response to a prospectus issued by the directors early in 1929, offering 22,000 ten per cent. cumulative participating preference shares of £1 each for public subscription, and the question is whether the issue of these preference shares was within the powers conferred on the directors by Article 10 or otherwise by Article 117.

It is agreed that, under the express terms of the Memorandum, there is a corporate power to issue preference shares, and the points for decision are (*a*) whether the existing Articles, so long as unaltered, restrict the company to the issue of shares with equal rights, in which case, the directors cannot hold any wider powers under Article 10 or Article 117, or (*b*) if the company is not so restricted, whether the power of the company to issue different classes of shares is communicated to the

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directors by either of these Articles. The New South Wales company law, which is governed by the Companies Act of 1899 of New South Wales, as regards the issue in this case may be taken as similar to the English company law of that period.

The Master in Equity held that Article 7 constituted an agreement on the part of the members of the company that the shares in the original capital should be characterised by equality *inter se*, and that none of the other Articles modified that agreement. In his view, Article 10 referred to terms and conditions to be attached to allotment and disposal of shares, but not to terms and conditions altering the character of the shares themselves, and the powers conferred on the directors by Article 117 could not include a power which the company did not itself possess. He based his conclusion on the opinion of Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*[1].

On appeal, Harvey, C.J., declined to accept the Master's construction of Article 7, and stated "whether the Memorandum says that the company may issue shares of different classes or is silent on the subject, it is clear law that the company has the power to issue shares of different classes, and the only question is whether it is incumbent on the company in its Articles of Association to say that it does propose to do so before it can effectively exercise that power. In my opinion the decision in *Andrews* v. *The Gas Meter Company*[2] must be taken as indicating that the Court of Appeal considered that such an expression of intention had to be found within the four corners of the Articles of Association." He further stated, "It is not necessary, of course, that the words 'preference shares' or 'different classes of shares' should be used; all that is necessary is that the Articles should contain some express words indicating that all shareholders may not necessarily be on the same footing. That being so, it is necessary to turn to these Articles to see whether there is such an express provision in them. Article 117 does not, in my opinion, touch the matter. That Article does not give the directors power to do anything which the company itself, in general meeting, could not do. The case is then narrowed down to the question whether Article 10 authorises the directors to issue preference shares." On consideration of

1. (1894) A.C. 399 at 417. 2. (1897) 1 Ch. 361.

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Article 10, and certain other Articles, the learned Judge held that the words "terms and conditions" included preferential rights.

In the High Court of Australia the learned Judges unanimously held (1) that it could no longer be maintained that Article 7 amounted to a contract *inter socios* that the shares should be uniform and rank equally; (2) that Article 10 did not deal with the classification of shares but only with the terms and conditions of their allotment and disposal; and (3) that Article 117 was concerned only with the management of the business of the company and not with the relations of members of the company *inter se*.

The law on this subject is very fully laid down in the judgment of the Court of Appeal, delivered by Lindley, L. J., in *Andrews* v. *The Gas Meter Company*[1], where the earlier decisions are reviewed and the dictum of Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*[2] is referred to. The law may be summarised as follows :—While the memorandum must state the amount of capital, divided into shares of a certain fixed amount, provision as to the character of the shares and rights to be attached to them is more properly made by the articles of association, which may be altered from time to time by special resolution of the company. If equality of the shareholders is expressly provided in the memorandum, that cannot be modified by the articles of association. If nothing is said in the memorandum, the articles of association may provide for the issue of the authorised capital in the form of preference shares; if the articles do not so provide, or do provide for equality *inter socios*, the power to issue preference shares may be obtained by alteration of the articles. If the memorandum prescribes the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the company has no power to alter that provision by special resolution.

The present case is not dealt with in that judgment, and appears to have now arisen for decision for the first time, for here the memorandum deals with the matter to the extent of giving the company power to issue *inter alia* preference shares as part of the original capital. In the existing articles there is

1. (1897) 1 Ch. 361. 2. (1894) A. C. 399 at 416.

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no express provision for preference shares as part of the original capital, but there is such express provision as regards any future issue of new shares. In these circumstances their Lordships are of opinion that in the absence of any article clearly restricting the company in that respect the company is entitled to exercise the powers expressly conferred on it by the memorandum. Their Lordships are unable to find any such restriction in the existing articles, and they are accordingly of opinion that the company has power to issue part of the original capital as preference shares.

As regards the powers conferred on the directors by Article 10, their Lordships have come to the conclusion that they include the power to control the character of the shares and that the words " terms and conditions " have a wider meaning than the respondent seeks to have placed upon them. Any uncertainty arises from the want of consistency in the use of the words rights, privileges, terms and conditions throughout the articles, but it seems clear that in Article 127 the term "conditions" is used as including provisions as to preferential rights.

In this view, Article 117, which only purports to confer additional powers, does not include the powers conferred by Article 10, but, if their Lordships had taken a different view as to Article 10, they would have been prepared to hold that Article 117 clearly delegated to the directors power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed, and that such delegation would include power to issue preference shares. Their Lordships are unable to agree with the narrow construction of the words " management of the business of the company " adopted by the High Court.

Their Lordships are therefore of opinion that the respondent is liable to be placed on the list of contributories, that the order appealed from should be reversed and that the order of the Chief Judge in Equity should be restored, the appellant to have the costs of this appeal and his costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Ashurst, Morris, Crisp & Co.*

Solicitors for respondent: *Elvy Robb & Co.*

S. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Trinidad and Tobago.]

PRESENT:—LORD ATKIN, LORD TOMLIN AND LORD MACMILLAN.

Arthur Andrew Cipriani and others .. *Appellants**

v.

Macdonald Burnett .. *Respondent.*

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Arthur Andrew Cipriani *v.* Macdonald Burnett.

Contract—Condition precedent—Ticket in Sweepstake—Decision of stewards on any dispute to be final—Effect of—Right of action.

The respondent purchased a ticket in a sweepstake which was expressed to be subject to the condition that in the event of any dispute arising with respect to any matters connected with drawing of the sweepstake or the awarding of the prizes the decision of the stewards of the Trinidad Turf Club thereon shall be final. In an action by the respondent for a declaration that the tickets at the draw had been erroneously numbered and that his was the first prize ticket,

Held, that on a proper construction of the terms of the ticket, the decision of the stewards was a condition precedent of a right of action for the stakes and that in the absence of a decision by the stewards, the action was not maintainable. "It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent of any legal proceedings."

Scott v. *Avery*, (1856) 5 H. L. C. 811; *Brown* v. *Overbury*, (1856) 11 Ex. 715 and *Dines* v. *Wolfe*, (1869) L. R. 2 P. C. 280, referred to.

Edward W. Cave, K. C. and *R. A. Willes* for appellants.

Sir Reginald Banks, K. C. and *S. P. J. Merlin* for respondent.

17th November, 1932. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—Their Lordships are invited in this case to assume the novel duty of adjudicating as to the winner of a sweepstake. The Law of Trinidad is apparently less stringent than that of the United Kingdom on the subject. There the Gambling Prevention Ordinance (Laws of Trinidad and Tobago, 1925, ch. 28) by S. 10 enacts as follows:—

"Every sale or contract for the sale of a lottery ticket is hereby declared to be void and no action shall be maintained by any person in respect of any such sale or contract, except by the purchaser for the return of the money or other consideration, if any, paid thereon."

But by S. 15 it is provided that—

"Nothing in this Ordinance contained shall apply to any lottery or sweepstake organised and controlled by the Trinidad Turf Club or by any racing club or association affiliated to the Trinidad Turf Club at or in

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*P. C. Appeal No. 115 of 1931. 17th November, 1932.

connection with any race meeting held under the auspices of any such club or association."

The sweepstake which has given rise to the present appeal was organised and controlled by the New Union Park Turf Club, a racing club affiliated to the Trinidad Turf Club, in connection with their Easter race meeting in 1931, and being thus a sweepstake of the character described in the section just quoted, its legality was not called in question.

In order to understand how the controversy arose it is necessary to describe briefly the system on which the sweepstake was conducted. Tickets bearing a serial letter and a serial number were issued by the promoters and sold to the public, and the winning tickets were subsequently ascertained by a draw. The apparatus of the draw consisted of (1) a revolving sphere in which were placed a number of small balls, each marked with a letter corresponding to one of the series of letters on the tickets, and (2) a board on which were fixed in a row four revolving discs bearing equally spaced round their circumferences ten figures from 0 to 9, each disc being so placed in relation to a flexible pointer that when the disc came to rest after being spun the pointer indicated a particular figure on the circumference. There were also a number of sealed envelopes each containing the name of a horse which was running at the race meeting. The method of operating the apparatus was to revolve the sphere and then by opening a trap in the bottom of it to release one of the lettered balls which it contained. This gave the serial letter of a ticket. Simultaneously the four discs on the board were spun and when they came to rest the four numbers indicated by the pointers were read off, and in this way the serial number of a ticket was obtained. The combined letter and number were then displayed on a blackboard in presence of the assembled public and written on one of the sealed envelopes. The process was repeated until each envelope had been marked with a letter and number. At the conclusion of the race meeting the envelopes were opened and the owner of the ticket whose letter and number corresponded to the letter and number written on the envelope which was found to contain the name of the horse which had obtained the highest aggregate of points at the meeting was declared the winner of the first prize, which consisted of 25 per cent. of the pool. There were also prizes consisting of diminishing percentages of the pool

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for each of the next seven horses, and 10 per cent. of the pool was divisible among the holders of the tickets representing the remaining horses. The balance of the pool, amounting to 38½ per cent., was apportioned in stated percentages to the sellers of tickets, the horse-owners, charity, the Turf Club Fund, and expenses. The tickets, in addition to showing the manner in which the pool was to be distributed, bore on their face *inter alia* the following printed matter:—

"This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matters connected with drawing of the sweepstake or the awarding of the prizes the decision of the Stewards of the Trinidad Turf Club thereon shall be accepted as final.

"Payments will be made on horses in the order of running as placed by the Judge, subject to the result of any objection that may be made within a fortnight of the races having been run.

* * * * * *

"The decimal method of drawing will be used."

Now, what happened on the occasion in question was this. Mr. Cipriani, one of the present appellants, who is the president of the Club and mayor of Port of Spain, presided at the draw, which was held in public on 2nd April, 1931, and the procedure above described was followed. No question arises as to the drawing of the serial letters, but objection has been taken to the manner in which the figures were declared. What Mr. Cipriani did was to spin the four discs on the board, which lay facing him on a table, and when the discs stopped to read off from right to left the figure which each pointer indicated. Among the letters and figures thus ascertained was B-9351, which was the distinguishing mark of the ticket owned by Mr. Guevara, one of the present appellants, and as B-9351 was written upon the envelope subsequently found to contain the name of the first horse, Mr. Guevara was accordingly declared to be the winner of the first prize. If Mr. Cipriani had read off the figures from left to right the winning ticket would have been B-1539, which is the distinguishing mark of the ticket owned by Mr. Burnett, the present respondent.

On 13th April, 1931, Mr. Burnett's solicitor wrote to the secretary of the New Union Park Turf Club, claiming payment of the first prize on his client's behalf on the ground that at the draw the winning number had been incorrectly declared as B-9351, owing to the figures having been wrongly read from right to left, whereas it should have been declared as B-1539, as it would have been if the figures had been properly read

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from left to right. Proceedings were subsequently taken in the Supreme Court of Trinidad and Tobago by Mr. Burnett against Mr. Cipriani and others as representing the Club in which he claimed a declaration that ticket B-1539 was the first prize ticket and that he was the holder of it and an order for payment to him of the amount of the first prize accordingly. Mr. Guevara, as the holder of ticket B-9351, which had been declared to be the winning ticket, was allowed to intervene as a co-defendant. Defences were lodged in which the defendants, in addition to maintaining that the holder of ticket B-9351 had been declared to have drawn the horse which scored the highest number of points and was consequently entitled to the first prize, founded upon the terms of the sweepstake as set out on the tickets, and submitted that it was thereby made a condition precedent of any right of action by the holder of a ticket that any dispute connected with the drawing of the sweepstake or the awarding of the prizes should first be determined by the final decision of the Stewards of the Trinidad Turf Club and that as the dispute which had arisen was one connected with the drawing of the sweepstake or the awarding of the prizes, and there was no decision thereon by the Stewards, this condition precedent had not been satisfied. The case came before the learned Chief Justice, Sir Charles Frederick Belcher, who, after hearing evidence and argument, pronounced judgment, declaring that as the holder of ticket B-1539 the plaintiff was entitled to the first prize in the sweepstake, and ordering the defendants (other than Guevara) to make payment to him of the amount thereof. Leave to appeal to this Board having been granted, the matter is now before their Lordships.

In their Lordships' view, the question which must be determined in the first place is whether the plaintiff (now the respondent) had, in the absence of a decision in his favour by the Stewards of the Trinidad Turf Club, any right of action at all. The ticket, which embodies the contract on which he sues, expressly requires him, as a condition of the sale to him of his ticket, to accept as final the decision of the Stewards of the Trinidad Turf Club on any dispute arising with respect to any matters connected with the drawing of the sweepstake or the awarding of the prizes. The dispute between the parties is plainly of such a character, but the respondent gives the go-by to this condition, subject to which he purchased the ticket, and

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asks that the Court shall substitute its judgment for that of the Stewards of the Trinidad Turf Club. Their Lordships are of opinion that he is not entitled to do so.

The learned Chief Justice states the question to be "whether the true construction of the first paragraph printed in the sweep ticket here is that it is such a provision as to fall within the principle of *Scott* v. *Avery*,[1] so that the decision of the Stewards is a condition precedent of any action, which would then strictly speaking be not on the original contract, but on the Stewards' award as appointed arbitrators; or whether the clause is mere matter of procedure for ascertaining the parties' rights, with nothing in it to exclude a right of action on the contract itself, but leaving open to the defendant club an application to stay the proceedings under S. 4 of the Arbitration Ordinance (Cap. 77)." His answer is that the clause "does not in its true construction require the plaintiff to go to arbitration as a condition precedent to action or mean that he has no cause of action except upon such decision as the Stewards may give."

Their Lordships agree that the question is one of construction, but in their view the learned Chief Justice has misconceived the effect of the condition printed on the ticket. It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent of any legal proceedings. In *Scott* v. *Avery*[1] the contract so prescribed, and the action was held not to be maintainable in the absence of an award, but Lord Campbell in his speech referred to *Brown* v. *Overbury*[2] as being identical in principle, and in the latter case, where the Court refused to entertain a claim for the prize in a sweepstake on a horse race, in the absence of a decision by the stewards as to the winner, the clause in the rules of the race provided no more, according to the report, than that any dispute as to the race was to be decided by the award of four stewards. Baron Alderson pointed out (at pp. 716-7) that—

"Every contract must be determined according to the circumstances belonging to it. This is one of racing and the universal practice has been that in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, viz., the judge or the stewards."

1. (1856) 5 H. L. Cas. 811. 2. (1856) 11 Ex. 715.

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Baron Martin at pp. 717-8 said:

"The judgment of the stewards in the case of a horse race must necessarily be conclusive; they are expressly appointed to decide the matter, and there is no appeal from them. It is a condition precedent to the plaintiff's right to recover that he obtain the judgment of the stewards."

Reference may also be made to the case of *Dines* v. *Wolfe*[1] before this Board, where it was pointed out at pp. 289-90 that a rule of the Australian Jockey Club referring any question as to the age of a horse to the final decision of the stewards, excluded any such question from the consideration of a jury.

Their Lordships recognise that in *Brown* v. *Overbury*[2] the dispute was as to which horse was the winner, whereas in the present case the dispute is as to what was the number of the winning ticket which was drawn, but the one type of question is as appropriate as the other for the determination of the stewards. It is a condition of the legality of a sweepstake in Trinidad that it shall be "controlled" by the club which organises it, and the provision in this case as to the manner of determining disputes connected with the drawing of the sweepstake is a reasonable exercise and incident of that control. Their Lordships accordingly read the condition on the ticket, having regard to "the circumstances belonging to it," as a condition precedent, the fulfilment of which is essential before any action for the stakes can be entertained by the Courts. The respondent produces no decision in his favour by the stewards of the Trinidad Turf Club, by whose decision he contracted to be bound. Having thus failed to fulfil the condition precedent of his right to sue, he cannot be heard to ask that the Court instead of the stewards should decide the dispute which he has raised. He claims that by the rules of the game he was entitled to be declared the winner, while he at the same time declines himself to abide by the rules.

Such being their Lordships' judgment, it becomes unnecessary for them to pronounce upon the merits of the dispute or to follow the learned Chief Justice in his acute analysis of the facts. It may be that the machine was not operated as it was intended to be worked, but it is at least satisfactory to note that there is no suggestion that Mr. Cipriani's mistake, if mistake it was, in the method of declaring the figures, was made otherwise than in good faith. It appears that throughout the draw

1. (1869) L. R. 2 P. C. 280. 2. (1856) 11 Ex. 715.

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he read all the figures the same way, namely, from right to left, and, that being so, the result was just as fortuitous as if he had read them all from left to right. The sweepstake, as their Lordships have observed, was controlled by the Club, and there would appear to have been nothing to prevent the Club, through its representative, from deciding in which way the figures should be read, provided that the decision preceded the ascertainment of the figures. It would certainly be improper for the person conducting the draw to decide, after the figures were known by the discs coming to rest, in which order he would read them, for that would plainly introduce an element of choice into a process intended to depend for its result entirely on chance.

Their Lordships will humbly advise His Majesty that the judgment of the Chief Justice of 15th June, 1931, be recalled and the action dismissed. The appellants will have their costs here and below.

Solicitors for appellants: *Mayley Tresdale & Co.*

Solicitors for respondent: *Markley Stewart & Wadesons.*

S. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Island of Ceylon.]

PRESENT:—LORD ATKIN, LORD TOMLIN AND LORD MACMILLAN.

Albert Godamune .. *Appellant**

v.

The King .. *Respondent.*

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Albert Godamune v. The King.

Ceylon Criminal Procedure Code (Ordinance XV of 1898), S. 355—Verdict of jury—Setting aside—Question of law—Dishonest misappropriation by trustee—No evidence to prove moneys belonged to beneficiary.

The appellant was one of the two trustees of the marriage settlement of one Harris. He was found guilty by the jury and convicted for dishonest misappropriation of moneys paid into his hands by the mortgagor to the trust estate and alleged to belong to the trust. The letter in pursuance of which the moneys were paid to him disclosed that the moneys were not intended to be paid to Harris but to be kept by the appellant to be adjusted or dealt with pending further instructions as a part of the private arrangement personal to the appellant and the mortgagor.

Held, that as there was no evidence upon which the jury could have found that the moneys were the property of Harris, the verdict of the jury could not be supported.

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*P.C. Appeal No. 124 of 1931. 10th November, 1932.

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H. I. P. Hallett for appellant.

Sir Stafford Cripps, K. C. and *K. Preedy* for respondent.

10th November, 1932. Their Lordships' judgment was delivered by

LORD TOMLIN.—This is an appeal by special leave from a judgment and order of the Supreme Court of the Island of Ceylon delivered on the 3rd March, 1931, whereby that Court by a majority answered adversely to the appellant a question of law reserved and referred for the decision of that Court by Lyall-Grant, J., under S. 355 (1) of the Criminal Procedure Code of Ceylon (Ordinance No. XV of 1898) after the conviction and sentence of the appellant at a Session of the Supreme Court in its criminal jurisdiction for the Midland Circuit held at Kandy.

Section 355 (1) of the Criminal Procedure Code of Ceylon is as follows:—

"355 (1).—When any person has in a trial before a Judge of the Supreme Court acting in the exercise of its original criminal jurisdiction been convicted of an offence and sentenced, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges any question of law which has arisen on the trial, stating in a case signed by him such question with the special circumstances upon which the same shall have arisen."

Sub-section (2) of the same section is in these terms:—

"If the Judge reserve any such question the person convicted shall, pending the decision thereon, be remanded to prison or, if the Judge thinks fit, be admitted to bail, and the Supreme Court shall have power to hear and finally determine such question and thereupon to reverse, affirm or amend the judgment or to make such other order as justice may require."

At the close of the arguments before their Lordships' Board their Lordships were of opinion that the conclusion reached by the majority of the Supreme Court was erroneous and that the conviction of the appellant ought to be quashed, and they intimated that they would humbly advise His Majesty accordingly. The statement of the reasons for their decision was deferred.

Those reasons their Lordships now give.

The facts of the case so far as they are relevant to the matter under consideration lie in a small compass.

At all material times the appellant and one W. R. Westland were trustees of the marriage settlement of H. F. Ensor Harris, and the trust property consisted of or included a first mortgage for Rs. 40,000 upon an estate called Belmont.

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The mortgage had been created in 1920 by one Boyagoda as part of a transaction by which he had purchased the estate from Harris.

Under the settlement Harris was the beneficiary entitled to the income of the trust property.

On the 14th March, 1927, the interest on the mortgage was in arrear to the extent of Rs. 23,000 and the appellant and his co-trustee began an hypothecary action (D. C. Kandy 34987) to enforce the mortgage.

The defendants to this action were Boyagoda and certain other persons, one of whom was named Peiris, and who are hereafter collectively called the Syndicate.

The Syndicate were joined as defendants in the action because they claimed an interest in the equity of redemption of Belmont through Boyagoda, such claim being the subject-matter of then pending litigation between Boyagoda and themselves.

The Syndicate were anxious to obtain a postponement of the hypothecary action in order that they might have an opportunity of first clearing up the title as between themselves and Boyagoda.

Accordingly through their proctor Cooke they approached the appellant, and after negotiation entered into an agreement with him, the terms of which were embodied in a letter, dated the 18th November, 1927, addressed to the appellant by Cooke.

The terms of the letter, which was marked "Confidential," were, omitting formal parts, as follows:—

"I understood from you at the interview you had with Mr. C. W. Peiris at my office some days ago that provided you were paid Rs. 10,000 on account of accumulated interest you would get the case to lay by for one year and that during that period the balance interest should be paid from time to time as my clients were able. Further, that you would undertake not to certify or record any payments made by my clients on account, should it become necessary for you to enforce writ for the recovery of the claim. Of course, if the amount realised by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by my clients toward the deficiency. The reason for this, as explained to you, is that my clients do not wish Mr. Boyagoda or anyone else to profit at their expense, as the mortgage was one that was executed by Boyagoda. On receiving your confirmation of this I shall send you a cheque for the Rs. 10,000."

At the time of this agreement the control of the hypothecary action was in the hands of the appellant in the absence elsewhere of his co-trustee Westland. At that time neither Westland nor

Harris was told of the agreement, and the appellant in his evidence said:

"If I gave time and the interest that accumulated was above the value of the land I thought in my position as a Trustee I would be liable to make good the deficit. . . . . The moneys paid to me were payments to indemnify me against any risks I ran."

Four payments were made to the appellant under the terms of the letter, namely :—

1. On the 26th November, 1927, Rs. 10,000.
2. On the 30th March, 1928, Rs. 5,000.
3. On the 28th August, 1928, Rs. 3,000.
4. On the 6th November, 1928, Rs. 5,000.

It is to be observed that, on the 30th March, 1928, the day on which the second payment was made, a decree was taken in the hypothecary action by consent of all parties in favour of the plaintiffs for the full amount of the principal sum of Rs. 40,000 and the arrears of interest without taking into account the sums then already paid by the Syndicate to the appellant under the agreement.

In November, 1928, the Syndicate had found some one who was willing to take an assignment of the benefit of the decree in the hypothecary action and were therefore not unnaturally desirous that the Rs. 23,000 paid under the agreement between themselves and the appellant should be certified as having been paid under the decree so as to reduce the amount which the assignee would be entitled to recover under the decree, and on the 23rd November, 1928, their proctor Cooke wrote to the plaintiffs' proctors asking that this should be done.

Westland, however, refused to assent to this course because the appellant had not accounted to him as his co-trustee or to Harris as beneficiary entitled to the income of the marriage settlement trust for any part of the Rs. 23,000. The money had apparently been utilised by the appellant in some way which made it difficult or impossible for him immediately to produce it.

However, subsequently the plaintiffs' proctors were authorised by both Westland and Harris to assent to the sum of Rs. 23,000 being certified as paid in the hypothecary action and this was done on the 21st January, 1929, on which date

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Harris wrote to the plaintiffs' proctors a letter which, omitting formal parts, was in the following terms :—

"With reference to the sum of Rs. 23,000 paid to Mr. Godamune on account of interest D. C. Kandy 34987, and for which the defendants are now claiming credit, I beg to inform you that Mr. Godamune has settled this matter with me as life-rentor by transferring Lunuwilla estate in my favour. You can therefore credit the decree in the sum of Rs. 23,000."

The plaintiffs in the hypothecary action ultimately were paid or recovered all that remained due to them under the decree after the payment of Rs. 23,000 had been certified.

Subsequently, however. Harris, who had apparently taken a transfer of the Lunuwilla estate from the appellant as security for the Rs. 23,000 and by reason of deficiency of value or defect of title or otherwise was unable to recover from the appellant the full amount of the Rs. 23,000, procured the launching of the prosecution out of which this appeal arose.

The indictment was dated the 2nd October, 1930, and as originally drawn contained seven counts, of which Nos. 1, 2 and 7 related to the first payment made by the Syndicate to the appellant of Rs. 10,000, and were withdrawn by the Crown apparently because any prosecution in respect of that payment was out of time.

The remaining four counts, which were re-numbered 1 to 4, related to the second and third payments and were as follows:—

"(1) That on a date between 30th March, 1928, and 21st January, 1929, at the place aforesaid, you did dishonestly misappropriate a sum of Rs. 5,000, the property of Mr. C. W. Peiris and others; and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code.

"(2) That at the time and place last aforesaid, you did dishonestly misappropriate a sum of Rs. 5,000, the property of Mr H. C. Ensor Harris; and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code.

"(3) That on a date between the 28th August, 1928, and 21st January, 1929, at the place aforesaid, you did dishonestly misappropriate a sum of Rs. 3,000, the property of Mr. C. W Peiris and others, and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code.

"(4) That at the time and place last aforesaid, you did dishonestly misappropriate a sum of Rs. 3,000, the property of Mr. H. C. Ensor Harris; and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code."

By order of the Court the second and fourth of these counts were respectively treated as alternative to the first and third of such counts.

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On the 10th January, 1931, the jury found the appellant guilty on the second and fourth counts, namely, those which laid the property in the sums in question in Harris, and therefore inferentially acquitted him on the other alternative counts.

A sentence of rigorous imprisonment for one year on each count, the sentences to run concurrently, was pronounced, but a question of law having arisen and been reserved, the appellant was admitted to bail.

On the 17th January, 1931, the learned Trial Judge at the request of counsel for the appellant, stated a case for the Supreme Court under S. 355 (1) of the Criminal Procedure Code, reserving and referring for the decision of the Supreme Court two questions of law which had arisen on the trial.

One question was subsequently abandoned by the appellant and need not be considered. The other question was as follows:—

"Was there evidence upon which the jury could find that the property was the property of Harris?"

On the 2nd March, 1931, the Supreme Court by a majority (Macdonell, C. J., and Dalton, J.) answered the question in the affirmative and affirmed the conviction and sentence. Garvin, S. P. J., dissented, holding that there was no evidence upon which the jury could have found affirmatively that the property was the property of Harris.

It is to be noted that under the counts of this indictment the property in the case of each of the two sums was laid in the Syndicate as the first alternative and in Harris as the second alternative. The appellant has been acquitted so far as the first alternative is concerned. If, therefore, there was no evidence upon which the jury could find that the property was in Harris, the only charge on which the appellant was tried and not acquitted falls to the ground and the proper result in the circumstances of this case must, in their Lordships' judgment, be the quashing of the conviction. The case is not one, therefore, in which it is necessary or proper for their Lordships to consider the extent of the powers of the Court under S. 355 (2) of the Code of Criminal Procedure.

Now, the meaning of the letter of the 18th November, 1927, is, in their Lordships' opinion, the critical point in the case.

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By S. 244 (1) (*b*) of the Criminal Procedure Code it is the duty of the Judge to decide upon the meaning and construction of all documents given in evidence at the trial.

The learned Trial Judge did not construe the letter or give to the jury any direction in regard to its meaning. On the contrary, he admitted evidence of intention from Peiris and Cooke, witnesses on the part of the prosecution, and from the appellant himself, evidence which, in their Lordships' judgment, was not admissible at all, and then left the matter to the jury at large with only such direction as is indicated in the following passage from the case stated:—

> "I instructed the Jury that if they found it proved that the money in question was paid to the accused as Mr. Harris' agent for the purpose of being handed over to Mr. Harris and that the property had passed from Peiris and others, they might consider it to be the property of Mr. Harris from the time it reached the hands of the accused. That ruling has been objected to and it is argued that there was no evidence on which Jury could have been directed to find that it was the property of Mr. Harris."

Now, the meaning of the letter regarded in the light of the surrounding circumstances, of which evidence was properly admissible, is reasonably clear. The money was to be paid to the appellant in consideration of his getting the case postponed for one year. As he ran some personal risk in doing that he was to be covered in this way, that if, on the ultimate sale, the proceeds were insufficient to provide for capital and all arrears of interest, he could make up the deficiency out of the moneys paid to him so far as they went. Except in this event the moneys so paid were not to go against what was owing on the mortgage at all, and if ultimately such moneys were not required to make up any deficiency they would have had to be paid or accounted for to the Syndicate. The references in the letter to "accumulated interest" and "interest" are nothing more than references for the purpose of fixing a measure of the amount of money to be paid.

On this view of the letter it is plain, in their Lordships' judgment, that it afforded no evidence that the moneys were paid to the appellant as agent for Harris or that such moneys by reason of the payment to the appellant became Harris' property. On the contrary, it was an essential feature of what was done that the arrangement should remain a private one between the appellant and the Syndicate, of which no one else was to know anything. If the appellant had paid the money

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over to Harris he would clearly have committed a breach of his obligations to the Syndicate.

If any regard is to be paid to the evidence of Cooke and Peiris, called on the part of the prosecution, it supported the view of the letter, which has been indicated, and no other view.

Cooke said, "I would have objected to the accused having paid the money to Mr. Harris. . . . Accused was to hold the money pending further instructions from me." Peiris said, "I still say that the terms of the arrangement were fully set out in Mr. Cooke's letter. . . . He (*i. e.*, the appellant) was to hold that money at our disposal. . . . I intended that he should not pay the money to Mr. Harris."

Reference has been already made to the appellant's statement as to his understanding of the position, which accorded with that of Cooke and Peiris, the witnesses for the prosecution.

The fact that the Syndicate consented on the 30th March, 1928, to a decree in the hypothecary action against themselves for the full amount of the interest in arrear without regard to the payments already made to the appellant under the letter of the 18th November, 1927, is a significant fact impossible to reconcile with the property in the moneys paid having passed to Harris.

The prosecution did not suggest that the letter did not represent the real bargain between the parties. The witnesses called by the prosecution said it did. When once, therefore, the meaning of the letter has been ascertained in the sense which, as already indicated, their Lordships think it bears, there remains nothing which could have been placed before the jury to found the conclusion that the moneys paid to the appellant were paid to him as agent for or were otherwise the property of Harris, and the verdict of guilty upon the second and fourth counts cannot be supported.

For these reasons their Lordships reached the conclusion which was stated at the close of the arguments.

Before parting with the case their Lordships desire to call attention to the fact that they were at some inconvenience during the hearing of the appeal from not having had available any full note of the learned Judge's summing up. Their Lordships understand that no such note was available to the Supreme Court. Their Lordships cannot but think that in

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cases under S. 355 (1) of the Criminal Procedure Code it is desirable that there should be available for the tribunal dealing with the reference a full note of the Judge's summing up.

Solicitor for appellant: *O. A. Cayley.*

Solicitor for respondent: *Burchills.*

S. R. *Conviction quashed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD WRIGHT, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Rai Shadi Lal .. *Appellant**

v.

Lal Bahadur *alias* Jagdamba Sahai and others .. *Respondents.*

P. C.

Rai Shadi Lal v. Lal Bahadur.

Hindu Law—Joint family—Joint property—Presumption—Onus of proving existence of ancestral property—Transfer of Property Act, 1882, S. 76, cl. (g)—Duty of mortgagee in possession to keep proper accounts—Disallowance of interest when no such accounts maintained.

In a suit to enforce against a Hindu son a mortgage executed by his father, the question whether the property mortgaged was the father's ancestral property was neither raised by the pleadings nor put in issue.

Held, that there being no presumption that a family, because it is joint, possesses joint property, the onus was on the defendant (the son) to allege and prove that the property in suit was joint family property.

Where a usufructuary mortgagee failed to keep such accounts as are required of a mortgagee in possession, the Court is justified in view of the provisions of S. 76, cl. (*g*) of the Transfer of Property Act in disallowing *in toto* his claim for interest.

Appeal No. 25 of 1929 from a judgment and decree of the High Court, Allahabad, dated the 10th November, 1926, modifying a judgment and decree of the Subordinate Judge of Bareilly, dated the 31st July, 1923.

Abdul Majid for appellant.

The respondents did not appear at the hearing.

19th December, 1932. Their Lordships' judgment was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—This is an appeal from a judgment and decree, dated the 10th November, 1926, of the High Court at Allahabad which varied a judgment and decree, dated the 31st July, 1923, of the Subordinate Judge of Bareilly.

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*P. C. Appeal No. 25 of 1929. 19th December, 1932.
Allahabad Appeal No. 6 of 1927.

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v.
Lal Bahadur.

Sir Dinshah Mulla.

On the 20th December, 1905, Munshi Indar Sahai executed a mortgage of his share of a village situated at Bareilly to secure payment of Rs. 7,000 lent to him by Rai Kishun Lal at interest at the rate of 7 annas per cent. per mensem.

The mortgage was one with possession, and the mortgagee was put in possession of the property on the same day. The mortgage was for a term of five years.

On the 15th June, 1906, the mortgagor executed a document called *samanatnama* (security bond) by which he created a charge on two other properties, the charge to operate if the property mortgaged by the deed of 1905 was found to be insufficient for payment of the mortgage debt in full. It was stated in the document that both these properties belonged to the mortgagor.

Some time thereafter the mortgagor died leaving him surviving two sons, who are the 1st and 2nd respondents before the Board, and a widow, who is the 3rd respondent. After his death the mortgagee obtained a decree on the 26th April, 1909, against the heirs of the mortgagor for Rs. 679-6-6, being the balance of interest due up to the 2nd January, 1909, and recovered the amount from them.

Respondents Nos. 4 to 7 are the heirs of the mortgagee, and the appellant is the transferee of their interest in all the properties. The 8th respondent held a lease of part of the mortgaged property from respondents Nos. 4 to 7 at an annual rent of Rs. 150. The lease expired some years ago, but it was alleged that a fresh lease had been granted to him by respondents Nos. 1 to 3. Respondents Nos. 9 to 12 are transferees of the interest of respondents Nos. 1 to 3 in some of the properties.

On the 20th December, 1922, the appellant brought the suit out of which the present appeal arises in the Court of the Subordinate Judge of Bareilly against the respondents to enforce the mortgage by sale of all the three properties. The amount claimed was Rs. 14,000, of which Rs. 7,000 was for principal, and the balance for interest.

In their written statement, respondents Nos. 1 and 2 averred that "the mortgaged property" was ancestral, and that there was no necessity for the loan. They also pleaded that the mortgage debt had been paid out of the rents and profits of the mortgaged property, and that nothing was due to the appellant.

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Respondents Nos. 4 to 7 also filed a written statement alleging that they had transferred their interest to the appellant, and that they were wrongly joined as defendants to the suit.

Several issues were framed by the Subordinate Judge of which the following three only are now material:—

"2. Whether the mortgaged property was the ancestral property of Indar Sahai, and whether the debt was incurred for legal and family necessity and binding on the sons of Indar Sahai?"

"6. Whether the bond is paid up by the usufruct of the property?"

"10. Whether the plaintiff is entitled to any relief, and if so, under what terms and conditions?"

Several witnesses were examined on both sides. The Trial Judge found on issue No. 2 that the mortgaged property was not ancestral. He treated the issue as one confined to the property mortgaged by the deed of 1905. He found issue No. 6 in the negative, and declared that the amount due under the mortgage was Rs. 14,000, to which he added Rs. 766 for costs, and a further sum of Rs. 935-10-8 for interest calculated at the rate of 6 per cent. per annum on Rs. 14,000 from the date of suit up to the 31st January, 1924, being the date fixed for redemption. In the result he passed a decree for sale of the properties comprised both in the mortgage deed and the *samanatnama*.

The 1st, 2nd and 3rd respondents appealed to the High Court at Allahabad. The learned Judges of the High Court agreed with the Trial Judge on his finding that the property mortgaged by the deed of 1905 was not ancestral, but held, differing from him, that the properties included in the *samanatnama* were ancestral. They also held that the appellant had failed to keep such accounts as are required of a mortgagee in possession, and disallowed the claim both for past and future interest. In the result they varied the decree of the Trial Judge by excluding the properties mentioned in the *samanatnama* from the order for sale, and by disallowing all interest. The order of the Lower Court as to costs was also varied, and directions were given for the costs of the appeal. From that decree of the High Court the plaintiff has brought the present appeal to His Majesty in Council. There was no appearance for the respondents at the hearing of the appeal before the Board.

Two contentions were raised on behalf of the appellant: (1) that the finding of the High Court that the properties

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comprised in the *samanatnama* were ancestral was wrong; and (2) that the High Court were wrong in disallowing the appellant's claim for interest.

On the first point the learned Judges of the High Court said in their judgment as follows:—

"An issue was framed as to whether the mortgaged property was the ancestral property of Indar Sahai or not, and the Judge found that it was not. He appears to have come to this finding with regard only to the property originally included in the mortgage and to have paid no attention whatever to the property covered by the security bond, and yet he has granted the plaintiff a decree which will enable him to put all the property to sale. We agree that the property included in the original mortgage bond is not ancestral property, but not only is there no proof that the house and the property in Maheshpur, which is included in the security bond, is not ancestral property, but the allegation in the written statement to that effect has never been answered even by the plaintiff."

Their Lordships are unable to find any allegation in the written statement that the properties included in the *samanatnama* were ancestral. Paragraphs 1, 2, 3, and the first part of paragraph 4 of "further pleas" in the written statement, relate solely to the property mortgaged by the deed of 1905, and issue No. 2, set out above, refers only to that property. The *samanatnama* is referred to in the latter part of paragraph 4, and the only issue as to that was whether it was "illegal and without consideration". Such being the pleadings and issues, it was not necessary for the Trial Judge to inquire whether the properties comprised in the *samanatnama* were ancestral. There is no presumption that a family, because it is joint, possesses joint property, and it was for the sons of the mortgagor to allege and prove that those properties were joint family properties. This, their Lordships think, they failed to do. Their Lordships are therefore unable to agree with the High Court that the properties included in the *samanatnama* were ancestral.

As to interest, it was urged that the High Court ought not to have disallowed the appellant's claim *in toto*, and they ought to have in any event directed an inquiry into the accounts. Their Lordships are unable to accede to this contention. As regards accounts, it is enacted by S. 76, clause (*g*) of the Transfer of Property Act, that a mortgagee in possession "must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee". No such accounts were kept by the appellant or his predecessors, nor were any such filed in Court. All that the appellant did was to place before the

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Court a day before the judgment was pronounced, and after the evidence was closed, some accounts which apparently were prepared from *khataunis* kept by the revenue authorities. No actual receipts from the land were shown in the accounts. The receipts as shown in the accounts included *inter alia* the rent payable by the 8th respondent, which, as already stated, was Rs. 150 per annum. The 8th respondent was a clerk in the employ of the heirs of the mortgagee, and he admitted in his evidence that the lease to him was "nominal," and that he paid the profits of the land to the heirs. Those profits were not shown in the accounts. In the circumstances, their Lordships think that the High Court were right in disallowing the appellant's claim for interest.

In the result, their Lordships are of opinion that the appeal should be allowed in part, and the decree of the High Court, dated the 10th November, 1926, should be varied by ordering that if the money realised by the sale of the property mortgaged by the deed of the 20th December, 1905, shall not be sufficient for payment in full of the amount decreed by the High Court, the properties comprised in the *samanatnama*, dated the 15th June, 1906, or a sufficient part thereof, shall be sold, and the nett proceeds of the sale shall be applied in payment of the balance due to the appellant, and their Lordships will humbly advise His Majesty accordingly. The appellant will bear his own costs before this Board.

Solicitor for appellant: *Harold Shephard.*

Respondent *ex parte.*

K. J. R. —— *Appeal allowed in part.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, SIR JOHN WALLIS AND SIR DINSHAH MULLA.

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Rai Bishunath Prasad Singh v. Rani Chandika Prasad Kumari.

Rai Bishunath Prasad Singh .. *Appellant**

v.

Rani Chandika Prasad Kumari and others .. *Respondents.*

Hindu Law—Gift in favour of daughter-in-law—Donee described as "malik mustaqil"—Gift expressed to be for "maintenance and support" of the donee—Nature of estate conferred.

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* P. C. Appeal No. 43 of 1930. 15th December, 1932.
Allahabad Appeal No. 12 of 1926.

A Hindu, being the full owner of certain property, made a gift of it to his daughter-in-law "for her support and maintenance," and declared that the donee should remain absolute owner (*malik mustaqil*) of the property gifted.

Held, that on its true construction, the deed conferred upon the donee an absolute estate in the property. The words "support and maintenance" in the deed merely indicated that the gift was made for the purpose of enabling the donee to live in comfort, and were not sufficient to cut down to a life-interest only the estate taken by the donee.

Jogeswar Narain Deo v. *Ram Chund Dutt*, (1896) L. R. 23 I. A. 37 : I. L. R. 23 C. 670: 6 M. L. J. 75 (P. C.) and *Naulakhi Kunwar* v. *Jai Kishan Singh*, (1918) I. L. R. 40 All. 575, relied on.

Judgment of the High Court, Allahabad, affirmed.

Appeal No. 43 of 1930, by special leave, from a judgment and decree of the High Court, Allahabad, dated the 2nd March, 1926, affirming a decree of the Subordinate Judge of Jaunpur, dated the 21st December, 1921.

The decision of the appeal turned upon the interpretation to be put upon a certain deed of gift executed by one Pirthipal Singh in favour of his daughter-in-law, Mst. Balraj Kunwar, on the 16th September, 1862. Both the Courts in India interpreted the document as conferring an absolute estate upon Mst. Balraj Kunwar. The High Court, in support of their decision, relied (*inter alia*) upon *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*[1].

Against the decree of the High Court, the plaintiff appealed to His Majesty in Council, by special leave.

De Gruyther, K. C. and *Parikh* for appellant.—The property being expressly given to Mst. Balraj Kunwar for her support and maintenance only, it was an indication that the grant was for her life-time: *Rajah Rameshar Baksh Singh* v. *Arjun Singh*[2].

Dunne, K. C. and *Wallach* for respondents.—The High Court was right in holding that the gift conveyed an absolute estate: *Surajmani* v. *Rabi Nath Ojha*[3], *Ramachandra Rao* v. *Ramachandra Rao*[4], *Bhaidas Shivdas* v. *Bai Gulab*[5], *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*[1], *Jogeswar Narain Deo* v. *Ram Chund Dutt*[6], *Naulakhi Kunwar* v. *Jai Kishan Singh*[7], *Shalig Ram* v. *Charanjit Lal*[8], *Syed Muhammad Rasa* v. *Musammat Abbas Bandi Bibi*[9] and *Jagmohan Singh* v. *Pandit Sri Nath*[10].

1. (1921) L. R. 49 I. A. 25: I. L. R. 1 Pat. 305: 42 M. L. J. 492 (P.C.).
2. (1900) L. R. 28 I. A. 1: I. L. R. 23 All. 194 (P.C.).
3. (1907) L. R. 35 I. A. 17: I. L. R. 30 All. 84: 18 M. L. J. 7 (P.C.).
4. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320 at 328: 43 M.L.J. 78 (P.C.).
5. (1921) L. R. 49 I. A. 1: I. L. R. 46 Bom. 153: 42 M. L. J. 385 (P.C.).
6. (1896) L. R. 23 I. A. 37: I. L. R. 23 Cal. 670: 6 M. L. J. 75 (P.C.).
7. (1918) I. L. R. 40 All. 575.
8. (1930) L.R. 57 I.A. 282: I.L.R. 11 Lah. 645: 59 M.L.J. 437 (P.C.).
9. (1932) L. R. 59 I. A. 236: 63 M. L. J. 180 (P. C.).
10. (1930) L. R. 57 I. A. 291: 59 M. L. J. 446 (P. C.).

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15th December, 1932. Their Lordships' judgment was delivered by

LORD BLANESBURGH.—In this case many questions were canvassed in the Courts in India but all, except one, have passed into history. They survive merely as an excuse for the over elaborate and bulky record which is before their Lordships.

The one issue which remains effective concerns a moiety share of a taluqa known as Jakhanian in the Jaunpur district in the Province of Agra which by a registered deed of gift, dated the 16th September, 1862, was given by Pirthipal Singh, the head of his family, to Musammat Balraj Kunwar, his daughter-in-law. The question is whether that lady had under the deed power to make alienations of the property giving to the respondents titles which are valid after her death. That question has been answered in the affirmative by the Subordinate Judge of Jaunpur and the result is embodied in his decree of the 21st December, 1921, which on appeal was affirmed by a decree of the High Court of Judicature at Allahabad, dated the 2nd March, 1926. The surviving plaintiff claiming under the donor Pirthipal Singh who is long since deceased again appeals.

The deed in question is short and in terms simple. Its true effect falls to be determined by the construction placed upon the following passages from it, read together:—

> " A moiety share of 'taluqa' Jakhania . . . belongs to me by virtue of purchase made at auction . . . As I have attained old age now, as it is possible that some dispute might arise after my death, and as it is my desire to make some arrangement for the support and maintenance of Musammat Balraj Kunwar, my daughter-in-law, I the executant have . . . made a gift of the entire above-mentioned property . . . *i.e.*, the zamindari rights appertaining to a moiety share of the above-mentioned 'taluqa' to my daughter-in-law . . . for her support and maintenance. I declare and give it in writing that the said Musammat should remain absolute owner (*malik mustakil*) of this property under this deed of gift and pay the Government revenue. I, the executant, and my heirs and representatives neither have nor shall have anything to with the above-mentioned gifted property. If any person brings any sort of claim in future it shall be considered false and invalid in face of this document. I shall get the name of the said donee to be entered in the Government papers under this deed."

This deed of gift has been most carefully analysed by Mr. Justice Lindsay in his judgment in the High Court and therein he has set forth with great clarity the reasons which have led him to the conclusion that the deed confers upon the

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donee an absolute estate in the property and not one which determined with her life.

Their Lordships find themselves in entire agreement with the learned Judge. They are satisfied that his reasoning, so far as based upon the terms of the deed alone, is correct and that his conclusion is completely justified by authority. Nothing said by Mr. de Gruyther or by Mr. Parikh for the appellant has weakened his judgment in any way, and their Lordships might well leave the matter there. But as they find further support for the learned Judge's conclusion in at least two cases cited to the Board, but not specifically discussed by him, they think it may be not without advantage shortly to refer to these now.

The first is *Jogeswar Narain Deo* v. *Ram Chund Dutt*[1] and it has a bearing upon the feature of the deed of gift here to which much importance was attached by the appellant. In the deed as was pointed out not only do you find the "support and maintenance" of the donee recited as the purpose of the gift but you find that expression repeated also in the words of disposition.

Now in *Jogeswar Narain Deo* v. *Ram Chund Dutt*[1] the effect of a disposition of a 4 annas share in a certain zemindary made by will in favour of the youngest wife of the testator and their son was in question.

The words of bequest of the 4 annas share were: " I give to you . . . and the son born of your womb for your maintenance," succeeded after an interval by the following words, attached, by construction, to the original gift, "and I give to you the power of making alienation by sale or gift".

Upon these words it was held by the Board that the words "for your maintenance," parcel of the words of gift were not sufficient to cut down to life-interests only the estates taken by the legatees and the reason is stated by Lord Watson in delivering the judgment of their Lordships at page 43:—

"It is no doubt true that the gift of the 4 annas share of Silda bears to be made to the Rani and the appellant 'for your maintenance'; but these words are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort, and do not necessarily mean that it was to be limited to a bare right of maintenance."

1. (1896) L. R. 23 I. A. 37: I. L. R. 23 C. 670: 6 M. L. J. 75 (P. C.).

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In that case the wider construction was assisted and adopted as a result of the words conferring upon the legatees a power of disposition by sale or gift.

But here the donee is described in the deed as "malik mustaqil" and the comprehensive intendment of that expression is illustrated in the second of the two authorities to which their Lordships think it desirable to refer.

It is the case of *Naulakhi Kunwar* v. *Jai Kishan Singh*[1] where, as here, a Hindu being the full owner of certain property made a gift of it to his daughter-in-law, describing the donee to the deed as *malik mastakil*. It appears from the argument of Counsel that the gift was expressed to be for "maintenance" (*see* p. 576, line 13).

In these circumstances the Court pointed out that this Board in *Surajmani* v. *Rabi Nath Ojha*[2] had held that the word "malik" alone, unless there was something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression indicates an absolute estate. "Here," they go on, "we have the word 'malik' followed by the word 'mastakil' which even makes it stronger."

The other indications in this deed pointing in the same direction and all discussed by Mr. Justice Lindsay lend to the words in the present case a completely compelling force.

Their Lordships accordingly do not consider it necessary to go further into the authorities, being really well content to accept on the whole matter the reasoning and the conclusion of that learned Judge.

In their Lordships' judgment the appeal fails, and they will humbly advise His Majesty that it be dismissed with costs.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

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1. (1918) I. L. R. 40 All. 575.
2. (1907) L. R. 35 I. A. 17: I. L R. 30 All. 84: 18 M. L. J. 7 (P. C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD WRIGHT, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

V. M. Abdul Rahman, since deceased (now represented by Sara Bibi and others) .. *Appellants**

v.

D. K. Cassim & Sons and another .. *Respondents.*

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Abdul Rahman *v.* Cassim & Sons.

Civil Procedure Code (V of 1908), S. 109 (a)—"Final order"—Order of Appellate Court, under Order 41, Rule 23, reversing decision of Trial Court on preliminary point and remanding suit—Test of finality—Order not finally disposing of the rights of the parties.

During the pendency of a suit, instituted on the Original Side of the High Court, Rangoon, claiming damages for a conspiracy between the defendants to ruin the plaintiffs' credit and reputation and to destroy their business, the plaintiffs were adjudicated insolvents. The Trial Judge held that the cause of action thereupon vested in the Official Assignee, and the latter declining to proceed with the suit, a decree was passed dismissing the suit. On appeal by the plaintiffs, the Appellate Bench held that the claim for damages did not vest in the Official Assignee, and that the plaintiffs were, therefore, entitled to continue the suit in their own names. The suit was accordingly remanded to the original Court for trial on the merits.

Held, that the judgment of the Appellate Court was not a decree, but an *order* passed under Order 41, Rule 23 of the Civil Procedure Code.

Held, further, that the order, though it decided an important and a vital issue in the case, did not finally dispose of the rights of the parties; on the contrary, it left the suit alive and provided for its trial on the merits in the ordinary way. It was not, therefore, a "final order" within S. 109 (*a*) of the Code and not appealable to the Privy Council.

The test of finality is whether the order in question finally disposes of the rights of the parties. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined by the Courts in the ordinary way, it is not a final order, and no appeal lies against it to the Privy Council under section 109 (*a*) of the Civil Procedure Code.

Ramchand Manjimal v. *Goverdhandas*, (1920) L. R. 47 I. A. 124: I. L. R. 47 C. 918: 39 M. L. J. 27 (P.C.), followed.

Rahimbhoy v. *Turner*, (1890) L. R. 18 I. A. 6: I. L. R. 15 B. 155 (P. C.) and *Syed Mushar Husein* v. *Bodha Bibi*, (1894) L. R. 22 I. A. 1: I. L. R. 17 A. 112: 5 M. L. J. 20 (P. C.), distinguished.

Appeal No. 30 of 1931 from a judgment of the High Court, Rangoon, on its Appellate Side, dated the 23rd June, 1930, allowing an appeal from a judgment and decree of Mr. Justice Cunliffe in the High Court on its Original Side, dated the 29th April, 1929.

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*P. C. Appeal No. 30 of 1931. 19th December, 1932.

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The suit giving rise to the appeal was instituted by the 1st respondents in the High Court, Rangoon, on its Original Side, against the original appellant and the 2nd respondent claiming damages for alleged conspiracy to ruin their credit and reputation and to destroy their business. During the pendency of the suit, the plaintiffs (1st respondents) were adjudicated insolvents, and as the Official Assignee (who was thereupon brought on the record as plaintiff) declined to proceed with the suit, the learned Judge on the Original Side dismissed the suit with costs. On appeal, the Appellate Bench of the High Court held that the cause of action did not vest in the Official Assignee and that the insolvents were entitled to carry on the suit in their personal capacity. The dismissal of the suit was set aside and the suit remanded for trial on the merits.

Leave to appeal to the Privy Council was granted by Carr, Offg. C. J. and Cunliffe, J., who held that the order of the Appellate Bench (remanding the suit) was a final order within the meaning of Ss. 109 and 110 of the Civil Procedure Code, inasmuch as it decided a cardinal point in the suit, namely, the capacity of the plaintiffs to prosecute the suit. The learned Judges relied on the decisions of the Board in *Rahimbhoy* v. *Turner*[1] and *Syed Mushar Husein* v. *Bodha Bibi*[2] and in referring to the decisions of the High Courts reported in *Sultan Singh* v. *Murli Dhar*[3], *Habib-un-nissa* v. *Munawar-un-nissa*[4], *Syed Khan* v. *Syed Ebrahim*[5] and *Sathappa Chetty* v. *Subramaniam Chetty*[6] they said that there was a very strong conflict of judicial opinion in India as to what was a final order.

Upjohn, K.C. and *A. Pennell* for 1st respondents.—We take the preliminary objection to the competency of the appeal on the ground that the order of the Appellate Bench, remanding the suit, was neither a decree nor a final order within the meaning of S. 109 of the Civil Procedure Code. It was simply an order made under Order 41, Rule 23 and did not finally dispose of the rights of the parties. The judgment of Lord Cave in *Ramchand Manjimal* v. *Goverdhandas*[7] on the interpretation of " final order," is directly in point, and we rely also on *Isaacs & Sons* v. *Salbstein*[8].

Dunne, K. C. and *Robert W. Leach* for appellants.—After the decision of the Appellate Court, the question of the plaintiffs' capacity to prosecute the suit in their own names could never be

1. (1890) L. R. 18 I. A. 6: I. L. R. 15 B. 155 (P. C.).
2. (1894) L. R 22 I. A. 1: I. L. R. 17 A. 112: 5 M. L. J. 20 (P. C.).
3. (1924) I. L. R. 5 Lah. 329 (F. B.).
4. (1903) I. L. R. 25 All. 629.
5. (1927) I. L. R. 6 Rang. 169.
6. (1922) 43 M. L. J. 758.
7. (1920) L. R. 47 I. A. 124: I. L. R. 47 C. 918: 39 M.L.J. 27 (P.C.).
8. (1916) 2 K. B. 139.

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disputed again. The order is binding on the Trial Judge and will equally be binding on the parties and on the Appellate Bench should there be a further appeal. It was therefore a final order, as laid down by the Board in *Syed Muzhar Husein* v. *Bodha Bibi*[1]. The decision was on the cardinal point of the suit: *Rahimbhoy* v. *Turner*[2].

[Sir George Lowndes referred to the decisions of the High Courts in India, cited in Mulla's Commentary on S. 109 of the Civil Procedure Code, that an order of remand was not, ordinarily, a final order.]

[Lord Thankerton referred to *Sultan Singh* v. *Murli Dhar*[3], where an order of remand was held not to be a final order.]

In England it has been held that orders which decide the rights of the parties, though made on interlocutory applications, are to be treated as final orders within the meaning of Order 58, Rule 3 of the Rules of the Supreme Court: In re *Stockton Iron Furnace Company*[4].

Upjohn, K. C., replied.

19th December, 1932. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The suit out of which this appeal arises was instituted in the name of the first respondent firm (hereinafter referred to as the 1st respondents) on the Original Side of the Rangoon High Court, alleging, in effect, a conspiracy between the two named defendants to ruin the business of the 1st respondents, and claiming Rs. 5,00,000 by way of damages. The first of the two defendants was the appellant, V. M. Abdul Rahman, now deceased, and represented by his heirs. The other was the 2nd respondent, who does not appear before the Board.

After the hearing of the suit had commenced in the Trial Court the 1st respondents were—apparently upon their own application—adjudicated insolvents. On this being brought to the notice of the Judge, he on the 13th February, 1929, adjourned the trial, and gave a month's time to the Official Assignee to consider whether he would proceed with the suit on behalf of the creditors. On the 11th March, 1929, the Judge

1. (1894) L. R. 22 I. A. 1: I. L. R. 17 A. 112: 5 M. L. J. 20 (P. C.).
2. (1890) L. R. 18 I. A. 6: I. L. R. 15 Bom. 155 (P. C.).
3. (1924) I. L. R. 5 Lah. 329 (F. B.).
4. (1879) 10 Ch. D. 335.

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being then engaged in the Criminal Sessions, the matter seems to have come before the Deputy Registrar, who enlarged the time till the 2nd April. On this date the Deputy Registrar gave a further extension to the 24th April and directed that the Official Assignee should "be brought on the record as plaintiff in the place of the insolvent plaintiffs," and the heading of the plaint was amended accordingly by the Assistant Registrar.

On the 24th April the matter was again mentioned to the Deputy Registrar, when counsel for the Official Assignee stated that "he had asked the insolvents to furnish him with security, but they had failed to do so". Whereupon counsel for the appellant asked that "the matter be placed before the Judge for the dismissal of the suit." This was done, and on the 29th April the suit was, by a decree of that date, dismissed. The decree was headed as in a suit between the Official Assignee, as assignee of the estate of the 1st respondents, and the defendants, but despite this fact and the amendment of the plaint above referred to the 1st respondents seem to have been treated as still parties to the proceedings, the Official Assignee disappearing from the stage altogether. They were given leave to appeal against the decree as paupers; their appeal was heard; the decree was set aside, and the suit was remanded to the original Court for trial on the merits. Against this order the present appeal has been brought to His Majesty in Council, upon a certificate of the High Court that the case fulfils the requirements of S. 110 of the Code of Civil Procedure, 1908. Before their Lordships a preliminary objection has been taken by the 1st respondents' counsel that the appeal is incompetent and that the certificate was wrongly granted. The ground of the objection is that the order of the Appellate Court was neither a decree nor a "final order" within S. 109 (*a*), and therefore not appealable under S. 110.

The grounds of the 1st respondents' appeal in India were, in effect, that their claim for damages was not property which vested under the Insolvency Act in the Official Assignee, that they were therefore entitled to continue the suit in their own names without his intervention; and that it had been wrongly dismissed.

It will be seen that this was in reality an objection that the Official Assignee ought not to have been brought on the record in their place, but there is nothing to show that any such

contention was raised on their behalf before the dismissal of the suit. Indeed the point seems to have been first suggested on behalf of a creditor, who was in fact the father-in-law of one of the insolvents, when the Trial Judge was actually delivering his judgment. It does not appear, however, to have been objected before the Appellate Court that the question was not open to the 1st respondents, or that they had ceased to be parties to the suit before the decree of the Trial Judge was made, and their Lordships are not prepared now to take any account of the very apparent irregularities in the Trial Court.

The judgment of the Appellate Court was delivered on the 23rd June, 1930. The learned Judges accepted the contention of the 1st respondents, holding that the claim to damages did not vest in the Official Assignee. They accordingly, as already stated, set aside the dismissal of the suit, and remanded it for trial on the merits by the original Court.

It is, in their Lordships' opinion, clear that this was, under the Code of Civil Procedure, an order and not a decree. It must be taken, they think, to have been made under O. 41, R. 23. The material part of which runs as follows:—

> " Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, *by order*, remand the case . . . . . ."

The matter is put beyond question by O. 43, R. 1 (*u*) which gives a right of appeal from an "order" so made.

It remains to consider whether the order in question was a "final order" within the meaning of S. 109 (*a*), and this question is, their Lordships think, concluded by the judgment of this Board delivered by Lord Cave in *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand*[1].

Upon the application for the certificate the matter was gone into at considerable length by the Officiating Chief Justice and Ellis Cunliffe, J., but by some mischance the authority just referred to was overlooked[2].

Two other cases before this Board were relied on by the learned Judges, viz., *Rahimbhoy Habibhoy* v. *Turner*[3] and

1. (1920) L. R. 47 I. A. 124: I. L. R. 47 C. 918: 39 M.L.J. 27 (P.C.).
2. The learned Judges, however, cited *Sultan Singh* v. *Murli Dhar*, (1924) L. R. 5 Lah. 329 (F. B.), in which the Board's judgment in *Ramchand Manjimal's* case is referred to at some length by Shadi Lal, C. J. and Broadway, J. at pp. 335, 342 of the Report.—K. J. R.
3. (1890) L. R. 18 I. A. 6: I. L. R. 15 Bom. 155 (P. C.).

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Syed Mushar Husein v. *Bodha Bibi*[1]. But both of these cases were decided with reference to the Civil Procedure Code of 1882, in which the wording of the relevant sections differed materially from that of the Code of 1908. Special leave to appeal was given in each of these cases on the ground that the suit had been fully tried in the Lower Court, and "the cardinal point" decided, leaving, in the one case, only a reference for accounts, and, in the other, only subordinate points for decision which should have been dealt with by the Appellate Court. In the first case it is clear that an appeal to His Majesty in Council would have lain as of right under the provisions of the present Code, and in the second that if the effect of the Appellate Court's decree had been (as in the present case) merely to remand the case for trial on the merits, different considerations would have applied. Their Lordships think, therefore, that neither of these authorities is applicable to the case now before them.

Turning to the judgment in *Ramchand Manjimal's* case[2], it will be apparent that the conditions there approximated very nearly to those of the present case. The question arose with reference to a series of suits upon cotton contracts, which had been stayed by the first Court under S. 19 of the Indian Arbitration Act, but in which the order for stay had been reversed on appeal, with the result that the suits went back for trial in the ordinary course. The Appellate Court being of opinion that its order was a "final order" within S. 109 (*a*) of the present Code gave a certificate under S. 110. At the hearing before the Board a preliminary objection was taken that the order in question was not a "final order" and that therefore the certificate was wrongly given and the appeals incompetent. The objection was upheld and the appeals were dismissed.

Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order "finally disposes of the rights of the parties," and he held that the order then under appeal did not finally dispose of those rights, but left them "to be determined by the Courts in the ordinary

1. (1894) L. R. 22 I. A. 1: I. L. R. 17 A. 112: 5 M. L. J. 20 (P. C.).
2. (1920) L. R. 47 I. A. 124: I. L. R. 47 C. 918: 39 M. L. J 27 (P. C.).

P. C.

Abdul Rahman v. Cassim & Sons.

Sir George Lowndes.

way". It should be noted that the Appellate Court in India was of opinion that the order it had made "went to the root of the suit, namely, the jurisdiction of the Court to entertain it," and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under S. 109 (*a*) of the Code.

Their Lordships would only add that the enforcement of this principle involves no practical hardship, inasmuch as, in a proper case, it is always open to the Appellate Court to give a special certificate under S. 109 (*c*).

It was pointed out in argument that there is some divergence in the views expressed in the English cases upon which the judgment in *Ramchand Manjimal's* case[1] founds, and that no doubt is so, but the rule deduced for guidance under the Indian Act is clear and unambiguous, and must, their Lordships think, be decisive in all cases where the question is whether an order is appealable to His Majesty in Council under the provisions of the section in question.

In their Lordships' opinion it is impossible to distinguish the present case from that upon which Lord Cave pronounced. The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important, and even a vital, issue in the case, but it left the suit alive, and provided for its trial in the ordinary way.

Their Lordships have thought it right to deal with this matter at some length, as there seems to have been a considerable divergence of opinion in some of the Indian Courts as to what is a final order under S. 109 (*a*), and they think that the decision in *Ramchand Manjimal's* case[1] must have been either overlooked or misunderstood.

For these reasons their Lordships think that the appeal is incompetent, and they will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellants: *Cutler, Allingham and Ford.*

Solicitor for respondents: *J. E. Lambert.*

K. J. R. *Appeal dismissed.*

1. (1920) L. R. 47 I. A. 121: I. L. R. 47 C. 918: 39 M. L. J. 27 (P. C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE BARDSWELL.

Sothavalan *alias* Irulan and others .. *Petitioners* (Accused —Appellants)*

v.

Rama Kone and others .. *Respondents (P. Ws. 1 to 4).*

Sothavalan *v.* Rama Kone.

Indian Penal Code (XLV of 1860), Ss. 147 and 323—Convictions under Ss. 147 and 323 separately—Whether separate punishments legal.

Where persons were convicted of rioting as punishable under S. 147 and of the substantive offence of voluntarily causing simple hurt under S. 323, Indian Penal Code, on the question whether the two separate punishments were legal,

Held, that the accused were properly and legally awarded separate sentences, one for rioting and one for having caused simple hurt.

Anthoni Udaiyan v. *Royappudayar*, (1927) 53 M. L. J. 653 and *Krishna Ayyar* v. *Emperor*, (1918) 20 Cr. L. J. 145, relied on.

Bishna v. *Emperor*, (1922) 73 I. C. 517, dissented from.

Kunnammal Mayan In re, (1927) 53 M. L. J. 656, referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Ramnad, dated 16th January, 1932 and passed in C. A. No. 1 of 1932 (C. C. No. 523 of 1931 on the file of the Court of the Taluk Magistrate of Ramnad).

G. Gopalaswami for petitioners.

A. Narasimha Aiyar for *The Public Prosecutor* on behalf of the Crown.

T. G. Singaravelu for 1st respondent.

The Court made the following

Bardswell, J.

ORDER. *Bardswell, J.*—The Petitioners in this case have been convicted of rioting as punishable under S. 147, Indian Penal Code and of the substantive offence of voluntarily causing simple hurt as punishable under S. 323, Indian Penal Code. They have been sentenced in all to 3 months' rigorous imprisonment each, two months for the rioting and one month for the causing hurt. They have also each of them been fined Rs. 15 for each offence. The only point that has now to be

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* Cr. R. C. No. 162 of 1932. (Cr. R. P. No. 148 of 1932). 13th December, 1932.

considered is that of whether the two separate punishments were legal.

For the Petitioners reliance is placed upon the decision of Curgenven, J., in *Kunnammal Mayan* In re.[1] In that case the learned Judge has held, though with some hesitation and while admitting that he saw a difficulty in arriving at his conclusion, that when a person is convicted both under S. 147 and S. 323, I. P. C., he could not be awarded a separate sentence for each of the offences. He has followed a decision, apparently unreported, of Krishnan, J., in C. R. P. No. 209 of 1924 and a decision of the Lahore High Court reported in *Bishna* v. *Emperor*[2]. The principle of these decisions is that where the causing of the hurt is itself the particular form of the force or violence which contributed to the offence of rioting, the one was included as an ingredient of the other. Curgenven, J., followed this principle and found it difficult to escape the conclusion that to convict for voluntarily causing hurt, where the only violence which formed the act of rioting was the hurt itself, offends against the provisions of S. 71, Indian Penal Code. A different opinion, however, has been expressed by Wallace, J., in a decision which is also to be found in *Anthoni Udaiyan* v. *Royappudayar*[3]. Therein he has pointed out that

> "Causing hurt and using force are not the same thing and the word 'force' does not appear in the definition of 'hurt'. The use of criminal force is no doubt an ingredient of the offence of rioting and the use of force may be an ingredient in the offence of rescuing cattle, but the force necessary to constitute these offences may fall far short of 'causing bodily pain' and if further force is used which does cause bodily pain, then, in my view, the offences which involve and are complete by mere use of criminal force have been exceeded and that excess constitutes another offence, *viz.*, that of causing hurt, or, causing whatever more serious form of bodily hurt has been the result".

With all respect I think that the view thus taken by Wallace, J., is correct; and what he says as to force is equally applicable to violence. The same view has also been taken by a Divisional Bench of this Court in *Krishna Ayyar* v. *Emperor*[4], a decision which does not appear to have been brought to the notice of either of the learned Judges whose decisions, above referred to, appear in 53 M. L. J. In that case it is remarked that

> "It has been well settled that where the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted

1. (1927) 53 M. L. J. 656.
2. (1922) 73 I. C. 517.
3. (1927) 53 M. L. J. 653.
4. (1918) 20 Cr. L. J. 145.

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under S. 147, cannot be convicted also under S. 323 or 325 read with S. 149, except that such of the accused as are proved themselves to have caused hurt in the riot would be rightly convicted of the offence of hurt in addition to the offence of rioting"

The convictions, therefore, of certain of the accused under Ss. 147 and 323, Indian Penal Code, were confirmed. With regard to the constructive S. 149, Gour's commentary shows that there is a conflict of opinion between the various High Courts but with that section we are not now concerned, as all the petitioners in this case have been convicted of offences of hurt individually committed. Except in the case of the Lahore Court in *Bishna* v. *Emperor*[1] there seems to have been no such conflict among the other High Courts as to its being legal to inflict a separate punishment on a rioter, on a substantial conviction under S. 323, from that awarded for the offence under S. 147. This was held by the Calcutta High Court in *In the matter of the Petition of Mohur Mir* v. *The Queen-Empress*[2], and more recently, in *Ram Angutha Singh* v. *Emperor*[3]. There are similar decisions in *Queen-Empress* v. *Bana Punja*[4] when the matter was considered by a Full Bench, and in *Queen-Empress* v. *Dungar Singh*[5] and in *Queen-Empress* v. *Ram Sarup*[6]. *Queen-Empress* v. *Dungar Singh*[5] dissented from a previous decision of that Court to the contrary. None of these cases has been referred to by the learned Judge who decided the case in *Bishna* v. *Emperor*[1]. It is the Allahabad view which has been followed in Calcutta and Bombay. As remarked in *Queen-Empress* v. *Dungar Singh*[5]:

"The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting and, in like manner, rioting can be committed without the commission of the two other mentioned offences."

This is putting in general terms what has been put more particularly by Wallace, J., in the quotation from his judgment given above. Taking this as the correct position as, in my opinion, it should be and as, indeed, has been found by a Bench of this Court to be settled, S. 71, Indian Penal Code, can have no application. I would hold, then, that the Petitioners have been properly and legally awarded separate sentences, one for rioting and one for having caused simple hurt.

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1. (1922) 73 I. C. 517.
2. (1889) I. L. R. 16 Cal. 725.
3. (1913) I. L. R. 40 Cal. 511.
4. (1892) I. L. R. 17 Bom. 260 (F. B.).
5. (1884) I. L. R. 7 All. 29.
6. (1885) I. L. R. 7 All. 757 (F. B.).

Sothavalan v. Rama Kone. Bardswell, J.

The sentences cannot be said to be excessive but, seeing that this case has been hanging over the Petitioners for over a year, that none of the injuries caused was of a serious character, and that they have already served out about half of their several terms of imprisonment, I do not think it necessary to send them back to jail. Their not being sent back is likely to be the more conducive to future harmony between them and the opposite party, and they have had their lesson. I would, therefore, reduce their sentences to rigorous imprisonment for the period already undergone and now set them at liberty, discharging their bail bonds. The sentences of fine and of imprisonment in default should stand as also the order for compensation to P. Ws. 1 to 4.

Beasley, C.J.

The Chief Justice.—I agree.

K. C. *Sentences reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH.

Palani Chetty .. *Petitioner* (Defendant)*

v.

A. R. S. V. Sevugan Chetty .. *Respondent (Plaintiff).*

Palani Chetty v. Sevugan Chetty.

Civil Procedure Code (V of 1908), S. 50 and O. 7, R. 6—Suit on promissory note—Expiration of period of limitation—Ground of exemption in plaint—Part payment towards principal on a certain date mentioned as saving limitation—Later amendment attempted to change the dates of payments averred in the plaint, on advice—Application to amend plaint essential.

O. 7, R. 6 is a rule of pleading. It makes no exception to the general rule that a plaintiff must plead the facts on which he relies for his case. If a party is advised that his pleadings are defective, the remedy is amendment by leave of the Court. There is no reason why a different consideration should apply to a plaintiff who wishes to throw over the ground of exemption from limitation pleaded and to put forward some other ground of exemption which he has not pleaded. If there is no application to amend the plaint, the suit ought to be dismissed as barred by limitation.

Jogeshwar Roy v. *Raj Narain Mitter*, (1903) I. L. R. 31 Cal. 195; *Jagannadha Row* v. *Seshayya*, (1907) 17 M. L. J. 281 and *Marudai Muthirian* v. *Chinnakannu Muthirian*, (1918) 52 I. C. 243, relied on.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge of Devakottai, dated 25th March, 1929 and made in S. C. S. No. 453 of 1928.

R. Kesava Aiyangar for petitioner.

Respondent not represented.

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* C. R. P. No. 1433 of 1929. 2nd December, 1932.

Palani Chetty v. Sevugan Chetty.

The Court delivered the following

JUDGMENT.—Defendant is the petitioner. He was sued on a promissory note. The plaintiff's suit was filed after the expiration of the prescribed period of limitation. He accordingly, in pursuance of O. 7, R. 6, Civil Procedure Code, stated in his plaint the ground on which he claimed exemption from the law of limitation. The ground was that there had been a part payment towards principal and interest on 15th June, 1925, by the defendant "as per Vaddichittai filed herewith". Some months later it apparently occurred to the plaintiff or his advisers that the ground alleged in the plaint could not be relied on, and an application was made to amend the plaint by averring payments on later dates by the defendant towards interest. The application was opposed by the defendant as out of time, and the application to amend was withdrawn. As a matter of fact, the payment pleaded was found to have been made towards principal, and as the fact of payment did not appear in the handwriting of the defendant as required by S. 20, Limitation Act, it did not avail to give a fresh starting point for limitation. But the Subordinate Judge, following certain cases which will be referred to presently, allowed the plaintiff to prove the later payments towards interest, notwithstanding that they had not been pleaded in the plaint as a ground of exemption from the law of limitation, and decreed the plaintiff's suit.

In *Jogeshwar Roy* v. *Raj Narain Mitter*[1] a Bench of three Judges held that the plaintiff who pleaded acknowledgment of a particular debt as an exemption from the Limitation Act was debarred by S. 50, Civil Procedure Code (corresponding to O. 7, R. 6) from proving another acknowledgment at a later date. But the Court indicated that the plaintiff might get over the difficulty by obtaining leave to amend his plaint. The decision was criticised by Beaman, J., in *Yakub Ebrahim* v. *Bai Rahimatbai*[2]. In that case the plaintiff alleged in his plaint that the defendant being an executor of his deceased creditor, there could be no bar of limitation. At the trial plaintiff sought to establish that the defendant was an express trustee within S. 10 of the Limitation Act. The learned Judge said:

"It seems to me that when a plaintiff does satisfy the requirements of S. 50, Civil Procedure Code, by stating what is in his opinion the ground

1. (1903) I. L. R. 31 Cal. 195. 2. (1908) 10 Bom. L. R. 346.

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upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another and not *inconsistent ground* should he be later advised that the latter is the true ground."

This opinion was approved in *Nistarini Debi* v. *Chandi Dasi Debi*[1]. But the Court proceeded to show that the proper course would be for the plaintiff to apply for leave to amend the plaint. Referring to O. 7, R. 6, the judgment says:

"The discretion of the Court in the matter of granting or refusing an application for amendment of the plaint cannot be restricted by an inflexible rule of law. It must be decided on the circumstances of each individual case, whether such application should be granted or not."

In other words, O. 7, R. 6 did not stand in the way of an amendment of the plaint. In *Hingu Miah* v. *Heramba Chandra Chakrabarti*[2], the judgment, as in the prior case, was delivered by Mookerjee, J. It cites *Yakub Ebrahim* v. *Bai Rahimatbai*[3] and *Nistarini Debi* v. *Chandi Dasi Debi*[1] as authority for the proposition that if the plaint shows the ground of exemption, O. 7, R. 6 is satisfied and the plaintiff ought not to be precluded from taking another and *inconsistent ground*. This ruling was adopted in *Parmeshri Das* v. *Fakiria*[4] by the Lahore High Court, though the point actually decided was that a plaintiff who has not pleaded a special ground of exemption might nevertheless take advantage of an admission made by the defendant in his written statement.

The learned Subordinate Judge in the present case has, quite reasonably, understood the two cases last cited as laying down that if a plaintiff pleads a ground of exemption, (which may be a bad ground but sufficient for the purpose of saving his plaint from rejection under O. 7, R. 11), he is free to urge any other ground at the trial without the necessity of amending his plaint. I do not agree with this view of O. 7, R. 6. It is not the view taken of it in *Jogeshwar Roy* v. *Raj Narain Mitter*[5] or by this High Court in *Jagannadha Row* v. *Seshayya*[6] and *Marudai Muthirian* v. *Chinnakannu Muthirian*[7]. O. 7, R. 6 is a rule of pleading. It makes no exception to the general rule that a plaintiff must plead the facts on which he relies for his case. If a party is advised that his pleadings are defective, the remedy is amendment by leave of the Court. I can see no reason why a different consideration should apply to

1. (1910) 12 C. L. J. 423.
2. (1910) 13 C. L. J. 139.
3. (1908) 10 Bom. L. R. 346.
4. (1920) 60 I. C. 772.
5. (1903) I. L. R. 31 C. 195.
6. (1907) 17 M. L. J. 281.
7. (1918) 52 I. C. 243.

Palani Chetty v. Sevugan Chetty.

plaintiff who wishes to throw over the ground of exemption pleaded and to put forward some other ground of exemption which he has not pleaded. In my opinion the plaintiff ought to have applied for leave to amend his plaint, and should not have been allowed to give evidence of the other ground of exemption without such leave having been given. No application for leave to amend was made at the trial, and, as already stated, the previous application was withdrawn by the plaintiff. The suit ought, therefore, to have been dismissed as barred by limitation. This petition is allowed and the decree of the Subordinate Judge will be set aside, with costs here and in the Court below.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE STONE.

The Mercantile Bank of India, Ltd. .. *Appellants** (*Respondents*)
v.
The Official Assignee of Madras .. *Respondent* (*Petitioner*).

The Mercantile Bank of India, Ltd. v. The Official Assignee of Madras.

Contract Act (IX of 1872), S. 178—"Person"—Meaning of—Assignment of railway receipts by way of security—Effect of—Valid pledge, if created—Presidency Towns Insolvency Act (III of 1909), S. 52 (2) (c)—Applicability—Constructive possession with pledgee—Goods in the custody of carrier—Notice to carrier of rights of pledgee—If, and when, material—"True owner"—Meaning of—Interpretation of statutes—"Golden rule".

The word "person" in S. 178 of the Contract Act is not restricted to mercantile agent. It includes the owner.

Under S. 178, a valid pledge can be made by pledging either the goods or the documents of title relating thereto, *e.g.*, by the endorsement and delivery, by way of security for a loan, of the railway receipts.

The insolvent was a dealer in groundnuts. The goods were purchased on credit at various centres in the mofussil, consigned by rail to the Port Trust and placed in the Port Trust godowns to await orders. The insolvent raised loans from the appellant Bank by endorsing and assigning the railway receipts in respect of those goods and giving them a letter of lien and a promissory note by way of security. On the date of bankruptcy, the goods in question were either in course of transit by rail or in the Port Trust inside godowns awaiting orders as to delivery. The Port Trust had no notice, until after the adjudication, of either the lien or the assignment of the railway receipts in favour of the Bank. In a contest between the Official Assignee and the Bank each claiming the goods, it was contended for the former that the railway receipt only conferred the right to receive the goods *in futuro*

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*O. S. Appeal No. 67 of 1930. 30th March, 1932.

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and did not pass the possession in the goods to the Bank and that the goods remained in the reputed ownership of the insolvent at the time of adjudication.

Held, (*a*) that the assignment of the railway receipt had the effect of a pledge of the goods themselves; that, alternatively, the effect of a pledge of the railway receipt as a document was to give to the pledgee as against either the insolvent or the Official Assignee the right to receive the goods from the carrier.

(*b*) that, as at the time of adjudication, the Bank was, by virtue of the railway receipts endorsed and letter of lien given to them, in constructive possession of the goods and the goods were actually in the custody of the carrier, in the railway waggon or goods-shed, over which the insolvent had no control, the goods could not be said to be in either the possession or order or disposition of the insolvent within the meaning of S. 52 of the Presidency Towns Insolvency Act; that further the consent of the Bank (the true owner) could not be assumed necessarily to follow from the absence of notice by the Bank to the carrier of the assignment of railway receipts or of the granting of the letter of lien, where, apart from notice, possession remained—not in the insolvent—but constructively in the Bank.

In re *Hamilton Young & Co.*, Ex parte *Carter*, (1905) 2 K. B. 381, on appeal, p. 772; In re *William Watson & Co.*, Ex parte *Atkin Brothers*, (1904) 2 K. B. 753, referred to.

"True owner" for the purpose of S. 52 of the Presidency Towns Insolvency Act includes a person having a lien, or an equitable charge, as well as a person having the legal title.

In construing statutes, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some inconsistency with the rest of the statute.

On appeal from the judgment of the Honourable Mr. Justice Waller, dated the 7th day of January, 1930, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 406 of 1929 in Insolvency Petition No. 82 of 1929.

Nugent Grant and *Vere Mockett* instructed by *Messrs. King & Partridge* for appellants.

The Advocate-General (*A. Krishnaswami Aiyar*) and *O. T. G. Nambiar* instructed by *Messrs. Moresby & Thomas* for respondent.

The Court delivered the following

JUDGMENTS. *Stone, J.*—The facts in this case are simple and can be stated as follows:— Stone, J.

The appellants whom I shall hereafter refer to as the Bank lent one C. K. N., now an insolvent, money by various loans. These loans were arranged in order to finance the purchase by C. K. N. of groundnuts.

C. K. N. was a large buyer of groundnuts. He purchased on credit. Sometimes he received delivery in the various centres in the mofussil; sometimes he received delivery in Madras. In the former case he was the consignor and the consignee;

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in the latter case he was the consignee mentioned in the various railway receipts relating to these various consignments during their transit by rail. Transit was by a carrier hereafter referred to as the Port Trust. The immediate destination in all cases was the Port Trust godowns at Madras. The goods were first placed in Port Trust godowns to await orders. The goods in question were there or *en route* at the time of the act of bankruptcy.

That was the course of business pursued by C. K. N., his sellers and his carriers in relation to the purchase, transport and delivery of these goods.

As regards C. K. N. and the Bank the following are the material acts done: C. K. N., having obtained railway receipts in respect of these goods bought on credit, took or sent the railway receipt in respect of any particular consignment to the Bank to arrange a loan. Before a loan was granted the borrower was required: (1) to endorse and assign the railway receipt; (2) to sign and give a letter of lien (*see* documents, page 49); (3) make and deliver a promissory note. The letter of lien is a document whereby the borrower "acknowledges to have deposited with the Bank the property hereunder mentioned as a collateral security for the due payment of" the promissory note. There are many other terms, the general purpose of which is to enable the Bank to make up the security if there appear to be a deficiency, to hold in respect of charges or expenses, to sell and appropriate, or, if necessary, to obtain such further documents as may be found necessary to vest in the Bank the property to enable the Bank to sell and to prevent the borrower from doing anything to revoke or avoid any authority given or to be given to enable the Bank to sell. The hereunder-mentioned property is shown in the schedule. The schedule mentions bags of groundnuts and refers to the number of the loan, particulars of which appear in the loan register. The precise bags of groundnuts can be identified from the information given in the schedule or the loan registers through the railway receipt.

The railway receipt is by the Bank stamped with the Bank stamp and endorsed on behalf of the Bank by the manager. It is handed to the Bank's head godown-keeper and by him entered with particulars in a book. In the past many of these railway receipts had been handed by him to the godown-keeper employed

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by the Bank who worked at the Port Trust outside godowns (*i.e.*, the godowns bearing the Bank's board) and by him handed to C. K. N.'s representative to enable him to obtain, on paying freight, the goods which, up to then, were in the Port Trust's inside godowns. It is unnecessary to complicate this narrative with a reference to various frauds which were thereby committed, the goods, title to which is in dispute in this case, being at all material times (*i.e.*, up to the date when the act of bankruptcy occurred, *viz.*, 7th February, 1929) either in course of transit by rail, or in the Port Trust's inside godown awaiting orders as to delivery.

As to the course of business between the Bank and the Port Trust, the Port Trust were aware of the Bank's board on the outside godown but were not given actual notice by the Bank, until after the adjudication, of either the lien created by the letter of lien or the pledge created by the assignment by way of security of the railway receipts. At that stage the Bank notified the Port Trust, but the Port Trust declined delivery to the Bank pending communication with the Official Assignee. The Official Assignee claimed the goods. Subsequently under order of Court the goods were sold by the Bank for the account of whosoever may be found entitled. The question of substance is: who is entitled, the Official Assignee or the Bank? The learned Trial Judge, on the issues as framed, has held that the Official Assignee is entitled. From that decision this appeal is brought.

In considering the law involved in the determination of the above questions it is very desirable to make it clear that the issues and consequently the judgment appealed from do not raise directly a question as to the effect of the letter of lien.

It is conceded however by the Advocate-General that (apart from the order and disposition clause) if either (1) the letter of lien creates a charge on these goods, or (2) the railway receipt by endorsement transfers not merely a title to receive but constructive possession of the goods, then the Official Assignee's title is postponed to that of the Bank, the Bank having in the first case a charge for the amounts advanced against these goods and in the second case a pledge of the goods for the amount advanced. But it is urged that (*a*) a railway receipt unlike a Bill of Lading, though a document of title, is a document giving title to receive but not giving constructive

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possession; possession being a necessary ingredient of the transaction of pledge, there being no possession there is no perfected pledge; or (*b*) granted a perfected pledge, the goods have remained in the order or disposition of the insolvent so as to pass to the Official Assignee under the reputed ownership section of the Presidency Towns Insolvency Act, S. 52 (2) (*c*). The argument addressed to us hardly glances at the effect of the letter of lien.

On the other hand it is urged that the railway receipt has, by statute, been assimilated for this purpose to a Bill of Lading, alternatively, has been treated by the custom of merchants in Madras as equivalent to a document passing possession of the goods by delivery of the document itself. It is also urged that in the circumstances here present, granted that the Bank is to be deemed the true owner of these goods for the purpose of S. 52, they have not so acted as to make the insolvent the reputed owner. No argument has been addressed to us dealing with the consequences flowing from the fact that these goods are the subject-matter of letters of lien.

As to custom: this is a question of fact and as there was some evidence on which the learned Judge could find as he did, his finding cannot be disturbed.

The most difficult question is as to the consequences which in law flow in India, from the endorsement and delivery, by way of security for a loan, of a railway receipt. If, for this purpose, a railway receipt constructively passes possession, then it is not contested the insolvent pledged his goods; if, on the other hand, the railway receipt passes the title to receive goods *in futuro* and on presentation of the railway receipt and a pledge of documents of title do not (save in the case of Bills of Lading) operate as a pledge of the goods, then it is conceded there was no pledge of the goods. This still leaves outstanding the question whether there was a pledge of the railway receipts and if so what effect in law that has. Issue 1, it is to be observed, relates to the transfer, the delivery and the pledging of railway receipts and mentions nothing about goods.

The material statutory provisions are as follows :—

By S. 137 of the Transfer of Property Act a railway receipt is declared to be included in the expression "mercantile document of title to goods". That section is part of a chapter which relates, and the section relates, to contracts, and

accordingly by S. 4 of the Transfer of Property Act it is made part of the Indian Contract Act.

By S. 178 of the Indian Contract Act applicable (it has since been substantially amended so as to be brought in line with the English Factors Act and Sale of Goods Act) it is provided that (the words that create difficulty are italicised):

> "a *person* who is in possession of any goods, or of any bill of lading . . . . . . order for delivery, or any other document of title to goods, may make a valid *pledge* of such *goods* or *documents*: provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly: provided also that such goods or documents *have not been obtained from their lawful owner*, or from any person in lawful custody of them, by means of an offence or fraud".

It is to be observed that this provision occurs in that part of the Contract Act which is headed "Bailments of Pledges" and that by S. 172 'the *bailment of goods* as security for payment of a debt or performance of a promise is called 'pledge'."

So in a part which, by transposition of terms, is purporting to deal with bailments of goods (whatever that may be) we have a provision which speaks of "a valid bailment of goods, of such goods or documents".

This, of course, is an impossible reading. The question is: (1) Is the expression "may make a valid pledge of such goods or documents" to be construed without reference to S. 172; or (2) are the words "of such goods or documents" to be deleted as redundant; or (3) should the expression be read as follows: "may make a valid pledge by the pledging of such goods or documents"? If the last alternative be chosen, then a pledge of the described documents has the same effect as pledging goods because "a valid pledge" means "a valid bailment of goods". If the second alternative be chosen, one is left in doubt how one may make the valid pledge but one would have to assume the addition of the words "by pledging such goods or documents" and so arrive at the same meaning as in the third alternative. If the first alternative be chosen one has to consider what is the effect of pledging a document as distinct from pledging goods.

Next what is meant by "person"?

This term can hardly be restricted to "mercantile agent". Can it in view of the words underlined in the proviso be restricted to mean "a person other than the owner"?

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In construing this difficult Act I think it is well to bear in mind the so-called Golden Rule for the interpretation of Statutes. It is thus stated in Maxwell, 5th Edition, at page 4:

> "In construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnancy or inconsistency with the rest of the statute."

Thus Lord Wensleydale in *Grey and others* v. *Pearson*[1]. Lord Ellenborough in *Doe* v. *Jessep*[2] described it as "a rule of common sense as strong as can be". Lord Cranworth in *Gundry* v. *Pinniger*[3] called it the cardinal rule and Jervis, C.J. in *Mattison* v. *Hart and another*[4] described it as the Golden Rule. Applying that rule to S. 178, one asks first: Does the phrase "person not in possession of goods" include (giving the words their ordinary meaning) the owner of the goods not in possession of goods? The answer is: It does. Next does that result in repugnancy or inconsistency with the rest of the instrument? Looking at S. 103 where the owner is expressly mentioned as a person having power to pledge (*i. e.*, make a bailment of goods) by pledging documents of title the answer is that it does not. Looking at S. 108 one sees a difference but neither a repugnancy nor an inconsistency. On the contrary the legislature when enacting the provisions of S. 108 expressly excludes the owner from rights *X* (relating to sale); when enacting S. 178 includes the owner in the class having rights *Y* (relating to pledge). That is not inconsistent or repugnant. The argument founded on a supposed carelessness must be rejected; as must that founded on the supposition that India must necessarily follow at a respectful distance England in its legislative advances. Even if the result of the construction were absurd that is no reason to depart from clear and unequivocal language capable of only one meaning. *See* Maxwell at page 5. The words in the proviso assist neither construction. They are neutral. Whether "person" includes owner or not, it clearly includes persons who are not owners and accordingly provision has to be made for them, and some classes of such persons have to be excluded. The provisos describe such excluded classes. The proviso relates, it

1. (1857) 6 H. L. C. 61 at 106: 10 E. R. 1216.
2. (1810) 12 East 288 at 293: 104 E. R. 113.
3. (1852) 1 De G. M. & G. 502: 42 E. R. 647.
4. (1854) 14 C. B. 385: 139 E. R. 147.

should be observed, to pledges of goods as well as to pledges of documents.

The duty of a Court is not to draft laws so that they may be just or reasonable or consonant to accepted principle. Its duty is to expound the laws as they stand giving to all words used the meaning they have either according to common usage or, if defined, according to the meaning given therein in the Act in question or in the Interpretation Act. It is of course in the last degree unfortunate that an Act should be drafted and then that definitions should be added which result in most curious results but however curious the results a Judge must give effect to them. The Legislature must use the pruning knife if it is to be used at all.

In deference to the argument addressed to us based upon other parts of the same Act and the state of the law as it stood when this Act in 1872 was passed, those arguments are now examined.

If Exception I of S. 108 is referred to it will be seen that, when dealing with the contract of sale, persons in possession of these documents of title may give a better title than they have. Here the Act says "when any person is, by consent of the owner, in possession, etc." It is urged that as in S. 108 the inclusion of the words "by the consent of the owner" excludes the owner from the class covered by the word "person," so in S. 178 it was the intention of the legislature to exclude "owner" from the term "person". I know, however, of no such rule of construction. It pre-supposes carelessness on the part of the legislature. The fact that owner is thus excluded from person in S. 108 suggests that it was not intended to exclude him in S. 178; otherwise, what could be easier than to use the same language in both cases? Where one finds words included in one section and excluded in another, one must assume either carelessness or intention and unless the latter results in an impossible position (and who is to say this position is impossible?) the legislature must be assumed to be using its language intentionally.

Then there is S. 103. This speaks of the assigning of a "bill of lading or other instrument of title to any goods by the buyer by way of pledge". In such a case, the unpaid vendor cannot stop except on satisfying the pledgee.

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Unless one is to use the word "pledge" here in one sense and in S. 172 in another, this section means that one may make a bailment of goods by pledging instruments of title. In *Ramdas Vithaldas* v. *S. Amerchand & Co.*[1] the Judicial Committee treated the effect of this section read with S. 102 as enabling a pledge of the goods to be effected by pledging not only Bills of Lading (which in English Law operate, unlike all other documents of title, to pass constructive possession of goods) but also "instruments of title". Their Lordships also held that instruments of title and documents of title are terms having, for the purpose of this Act, similar meanings. For similar reasons, it may be concluded that the "mercantile documents of title" referred to in S. 137 of the Transfer of Property Act are documents which are included in the wider expression "documents of title" and that "documents of title or instruments of title" include railway receipts.

Now if under the provisions of S. 103 the pledging of a railway receipt effects a pledging of the goods, is it not desirable so to construe S. 178, if the rules of construction so permit, as to enable that section to be so read as to provide also for the pledging of goods by the pledging of documents of title? Otherwise, of course, very curious results flow. In this case, this results: If here the unpaid vendor of the goods had exercised his power to stop, a power which arises on insolvency by S. 99, he could have defeated the Official Assignee but he would have had to pay off the Bank: but if he does not exercise this power then (because S. 178 and not 103 applies, and we are for the sake of the analysis assuming a different effect of pledging documents under 178 from that which flows as from 103) the pledge is only of the document, the goods are not pledged, the possession of the goods as distinct from the documents does not pass and the Official Assignee can claim as against the Bank. This appears to result in the impossible position that the Bank's position is entirely altered according to whether an independent third party does or does not exercise a power against the Official Assignee; improving if he does exercise the power and declining if he does not.

1. (1916) L.R. 43 I.A. 164 at 169, 170: I.L.R. 40 B. 630: 31 M.L.J. 541 (P.C.).

This difficulty immediately disappears if one choose the third alternative reading of S. 178 above referred to. As no other reading appears necessarily to follow from the language used, this reading appears to be the one most consonant to the other provisions of the Act.

There remains the difficulty caused by the use of the word "person". This difficulty may be expressed thus:

"At Common Law a pledge of goods could only be effected by parting with the possession actually or constructively of the goods. By the Law Merchant, Bills of Lading but no other documents of title were treated as equivalent for this purpose to goods. The transfer of a delivery order operated only as a token of authority to take possession and not as a transfer of possession. See *M'Ewan* v. *Smith*[1]. This position was altered by the Factors Act which eventually enabled a restricted class of agents (but not the principal) to pledge goods by pledging documents of title to goods. This entirely changed the effect of a document of title when, but only when the pledgor was a mercantile agent. The law in England did not reach even this stage until the Factors Act of 1877. The Indian Contract Act, on the other hand, was passed in 1872 and the law previously applicable was that enacted by the Indian Factors Act of 1844, the provisions of which are textually the same as the English Factors Act of 1842. This gave to the owner no such power to pledge goods by pledging documents. Therefore an owner cannot pledge goods by pledging documents unless delivery of the documents operates as constructive possession of the goods and this is so only in the case of Bills of Lading. That appears to be the argument based on the history of this legislation."

Thus if the word "person" includes "owner," and if the section is read as above construed, it results in this : that in 1872 the Indian Legislature went far beyond the position arrived at in England even to-day, for it made pledges of documents the same as pledges of goods not only when the document was pledged by a mercantile agent but where it was pledged by anybody (subject to the provisos) including the owner. Although this may seem improbable, it is not impossible, and whether "person" does or does not include owner it certainly includes a wider class than the class of mercantile agents so that some

1. (1849) 2 H. L. C. 309.

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extension of the English position on any reading must be involved. This being so, no reason is seen for giving to a word which appears to be unambiguous a meaning other than its ordinary meaning. That "person" in such a collocation includes "owner" *prima facie* appears to be clear.

But there is in my opinion a conclusive consideration to be derived from section 103. This section, as the Judicial Committee in the above cited case have held, enables goods to be pledged by pledging documents of title. But the pledgor there referred to is left in no doubt. It is the buyer of the goods. That is to say, the owner may under Section 103 pledge goods by pledging documents. Why then is it necessary to do violence to the use of words by excluding him from the class of persons who may pledge goods by pledging documents when one is considering Section 178 ?

If, as is urged by the Advocate-General, Section 178 relates to (*a*) the pledging of goods, and (*b*) the pledging of documents, then as also urged by him, no provision such as is contained in Section 3 of the English Factors Act is contained in the Indian Contract Act and so a pledge of a document of title has no other effect than pledging the document. For the reasons above assigned, Section 178 should be so construed, *i.e.*, it should not be construed so as to distinguish between a pledge of goods and a pledge of documents. It is purporting to deal with pledges and pledges are defined as bailments of goods.

I am therefore of the opinion that here there was a pledge of railway receipts and such pledge had the effect of pledging the goods. Alternatively if I am wrong in regarding a pledge of a railway receipt as a pledge of the goods there was in my opinion a good pledge of a railway receipt as a document and the effect of that was to give to the pledgee as against either the insolvent or the Official Assignee the right to receive from the carrier those goods. There being no notice, assuming the alternative opinion is the correct one, had the Port Trust parted with actual possession to a third party, or had a third party lawfully seized the goods as in the Scotch case of *Inglis* v. *Robertson*[1] it might well be that owing to the Bank's failure to notify the person having custody of the existence of the pledge the Bank would have no remedy either against the carrier or

1. (1898) A. C. 616.

the person obtaining possession. No such question however here arises in my opinion.

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It is necessary before parting with this branch of the case to advert to the practice of the Port Trust of delivering against indemnity bonds to persons without production of the railway receipts. This power is said to be derived from Section 57 of the Railways Act. It is said that such a power shows that a railway receipt is not a document of title capable of passing possession when pledged. I do not think so. The effect of so delivering is that the Port Trust if held liable have their remedy over against the person giving the indemnity. That is to say, they have a right, derived from the indemnity bond, to claim to be indemnified. Indemnity only arises where the person to be indemnified suffers a loss. The loss arises because such person is made liable. Having been made liable and having suffered loss, the carrier proceeds on the indemnity bond. If the person giving it is insolvent, that is the carrier's misfortune.

Further the fact that it was considered necessary to give this statutory right to the carrier to refuse delivery suggests that apart from such statutory power he would have been bound to deliver and this appears to be so whether one regards a railway receipt as a document of title passing constructive possession (as a Bill of Lading) or a document of title giving the right to receive (as a delivery order).

The next question that arises is: Assuming that there was a pledge of the goods and that accordingly constructive possession had passed to the Bank, were the goods in the order and disposition of the bankrupt ?

The material dates and facts are as follows:—The goods in question were despatched in various parcels from various places between 13th January and 4th February: the act of bankruptcy occurred on the 7th February. At that date some of the goods were on rail, some were in the Port Trust's inside godown, *i e.*, freight charges had not been paid and the carrier was either carrying them or holding them in warehouse pending delivery. Such warehouse was the railway goods shed or godown. The dates on which the various parcels arrived at the Port Trust godowns are shown at page 41 of the documents. n the case of items Nos. 7, 10, 12, 13, 14, 16, 17, 18, 23, 24

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and 25 the goods had arrived on or before the 7th February. In all the other cases, the goods arrived on or after 7th February, *i.e.*, were in transit at the time of the act of bankruptcy.

The learned Trial Judge has expressed the opinion that in the circumstances here present the goods were in the order and disposition of the insolvents with the Bank's consent. He adds:

"It has always been held that the absence of notice by the true owner of his title to the bailee is evidence of such consent."

Now of course the reputed ownership clause is generally resorted to where the possession is in the insolvent and the ownership in a third person. Here the custody is in a carrier, the constructive possession is in the Bank, and the ownership in the insolvent. "True owner" for the purpose of S. 52 can have a very special meaning and can include a person having a lien or an equitable charge, as well as a person having the legal title. But is the section applicable where, as here, not only are the documents of title transferred but the insolvent has given a letter declaring that the goods are deposited with the Bank by way of security and where the goods are not in any place or warehouse over which the insolvent has control but in a carrier's railway waggon or goods shed?

A case which in my opinion is similar to this came before the Courts in England in 1905. In that case (In re *Hamilton Young & Co.*, Ex parte *Carter*[1]) the Bank advanced moneys to traders for the purchase, preparation and shipment of goods to the East. The course of business was for the traders to send the goods to bleachers who bleached them and sent them to packers to be packed for shipment. The Bank was handed bleachers' receipts. Prior to the act of bankruptcy the Bank gave notice to the bleachers and to traders claiming the goods. Here no notice was given to the Port Trust. Whether that makes all the difference on this point I shall consider.

The first question was whether the letter of lien amounted to a bill of sale. No such question arises here.

The next question was, assuming the letter of lien was not void, were the goods in the actual possession of the bleachers in the order and disposition of the bankrupt as being held by their bailees (the bleachers) with the consent of the "true

1. (1905) 2 K. B. 381, on appeal p. 772.

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owner" (the bank as persons having a charge created by the letter of lien)? Bigham, J., at pages 389 and 390 observes:

"It was said that the goods were in the order and disposition of the bankrupts at the commencement of the bankruptcy. That is a question of fact, and there can be no doubt as to the answer to be given to it. The goods were no doubt the goods of the bank in the sense that they had a charge on them; but the Bank never consented to the goods being in the order and disposition of the bankrupts in their trade or business, and certainly did not do so under such circumstances that the bankrupts became the reputed owners of the goods."

In re *William Watson & Co.*, Ex parte *Atkin Borthers*[1] was followed. That case decided, what I believe has never since been doubted, that whether the clause applies depends upon the circumstances of the case and whether those circumstances necessarily lead to the inference of ownership. The inference of ownership must, not might, arise. See at pages 756 and 757.

On appeal in *Hamilton Young's case* at page 758 Vaughan Williams, L. J., does not put the matter on the ground of notice at all, and with respect, I think for a very good reason. He considers the documents, the letter of lien and the bleachers' receipts. He points out that the goods as from the moment of the giving of the letters of lien (not from the date of the notice) were subject to a good lien on the part of the Bank. Coupled with the receipts he came to the conclusion (though I find page 788 somewhat difficult to follow unless there is a misprint) that the Bank had possession and control. See as to this Cozens-Hardy, L. J., at page 790. The test there applied at page 785 and at page 790 was,

"Would the Bank have been entitled to an injunction restraining the traders if the traders had attempted to take the goods out of the control of the Bank by dealing with them for a purpose other than that contemplated, *viz.*, preparing, packing and shipping."

The answer being yes, it followed that the Bank had control.

The question there was, of course, whether the letter of lien coupled with the bleachers' certificate were documents "used in the ordinary course of business as proof of the possession or control of goods" within the meaning of the Bills of Sales Act. But if that is so how can it be said that in the circumstances here present with a pledge, and a letter of lien, with the goods on rail or in a carrier's warehouse, how can it be said that the goods were in either the possession, order or

1. (1904) 2 K. B. 753.

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disposition of the insolvent? And even if that were so, what is the evidence that it was with the consent of the true owner unless consent is to be assumed necessarily to follow from absence of notice to the carrier of the assignment of railway receipts or of the granting of letter of lien? In my opinion the appellants here are in the same case as the plaintiffs in *C. Simeons & Co.* v. *Durand's Trustee*[1]. They did not by their conduct in any way induce a belief that these goods were in the possession, order or disposition of the bankrupt under such circumstances that he was the reputed owner thereof. I do not apprehend that the learned Trial Judge made a finding of fact to the contrary but rather that he arrived at his conclusion because the Bank had not notified the Port Trust that the Bank held the railway receipts and that "it had always been held" that absence of notice proved consent to the goods being in the order or disposition of the bankrupt as reputed owner. This appears to be a finding of law and with great respect I think it goes too far. Absence of notice is one circumstance. It is a circumstance that might make all the difference if, apart from notice, the possession remains in the insolvent but here whether one regards the pledge or the lien, possession had constructively passed to the Bank. It might make a difference if the order or disposition remained in the insolvent but without the railway receipts he could not demand delivery of those goods. S. 57 of the Railways Act gives a right to the carrier; it gives no right to the consignee. Without those railway receipts had the carrier so chosen the consignee was powerless to touch the goods. Whether or not delivery under general indemnity bonds is authorised by S. 57 there is no evidence that the Bank either knew of such practice in general or that C. K. N. was on the general indemnity list. The Bank had no reason to imagine that delivery would be made to any one in the absence of the railway receipts. The previous course of business had been, so far as the Bank knew, that delivery was made on railway receipt to any outside godown bearing the Bank's name. If a *bona fide* person had demanded these goods from the Port Trust, and the Port Trust, not having notice of any other claims, had delivered without production of the railway receipt, then the absence of notice would probably be a matter of great

1. (1928) 2 K. B. 66.

importance when considering the liability of the Port Trust or the title as against the Bank of the person to whom delivery had been made but I cannot think it concludes the question as to whether the goods are in the possession, order or disposition of the insolvent by the consent of the true owner under such circumstances that he is the reputed owner thereof.

Again the absence of notice might be a critical matter in a contest between a pledgee or a lienee and the Official Assignee where the pledge or lien to be made effective required a third party in custody of the goods to alter his position from that of a bailee possessing on behalf of the insolvent to that of a bailee possessing on behalf of the pledgee or lienee, because until that change in possession had occurred the pledge or lien might be deemed imperfect. Where, however, as here the pledges of the documents are as though they were pledges of goods the pledge is perfect and there is constructive transfer of possession from the pledgor to the pledgee apart from notice. And even though I may be wrong in attributing this effect to the pledging of a document of title and such a pledge of a document of title does not operate as constructive possession of the goods, yet in this case one cannot ignore in this connection the letter of lien. In my view, as between the insolvent and the Bank, as from the moment any good letter of lien was completed and handed to the Bank, from that moment the Bank is to be deemed in any contest between the Bank and C.K.N. or C. K. N.'s representative-in-title as having possession of the goods, the subject-matter of the letter of lien. Were it otherwise, one would not be giving effect to the plain words of the letter which are to the effect that the goods in question are deposited with the Bank by way of security. It is true that they are not deposited actually upon the Bank's premises but I think the clear intention of the parties is that as from that moment those particular goods are to be deemed to be held by either the insolvent or any bailee from the insolvent not for the insolvent but for the Bank and the insolvent's possession or the possession of a bailee from the insolvent is to be deemed in any contest between the Bank and the insolvent or his representative-in-interest as the possession of the Bank. It might well be that the absence of notice of this arrangement come to between the Bank and the insolvent would enable a third party who has in the absence of such notice altered his position for the worse

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to raise a plea of estoppel based on the absence of such notice. It might well be that a bailee who in the eye of the law would be deemed a bailee for the insolvent would be able to defend himself against a claim founded in a wrongful delivery to a person other than the Bank on the ground that the Bank had not notified him of that lien. In all such contests as these absence of notice might be critical but I do not think that absence of notice to the carrier in itself renders the conclusion inevitable that the goods were in the order or disposition of the insolvent as reputed owner with the consent of the true owner. I think any member of the public finding that the documents of title to receive these goods were not with the insolvent would arrive at the conclusion that the goods were not in his order and disposition. I am clearly of the opinion that they would not be compelled to come to the conclusion that they were in the insolvent's order and disposition simply because, on enquiry of the carrier, the carrier informed them that no notice of any assignment or other dealing with the railway receipts had been received. Very different considerations would arise if the circumstances were that the goods had been delivered to outside godowns whence the insolvent could remove them without the railway receipt. In such a case notice to the warehouse keeper might in some circumstances I think be necessary to prevent the goods being in the order and disposition. That however is a question to be decided when it arises. It does not in my opinion arise in this case.

In my view accordingly the appeal succeeds with costs here and below.

Beasley, C.J.

The Chief Justice.—I agree.

S. R. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Thillaikannu Achi .. *Petitioner* (Plaintiff)*

v.

Sheik Abdul Kadir Rowther .. *Respondent (Defendant).*

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Limitation Act (IX of 1908), Arts. 116, 62 and 97—Contract of sale of land—Suit by vendee against stranger in possession—Dismissal of—Subsequent suit against vendor for damages—Starting point.

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*C. R. P. No. 826 of 1929. 14th September, 1932.

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The plaintiff purchased certain lands in 1916, but was unable to get possession of some of them. He sued the person in possession but his suit was dismissed in 1921. Within six years thereafter the plaintiff brought the present suit for damages against his vendor for breach of the implied covenant of title. The suit was dismissed by the Lower Court as barred by limitation under Art. 116 of the Limitation Act, time having begun to run from the date of the sale deed.

Held, that the suit was governed by Art. 116 and not by Art. 97 or 62 and as the contract could be said to have been broken only when it was found as a result of the suit against the stranger in possession that the vendor had no title, the starting point for limitation was the date of the dismissal of the suit against the stranger and not that of the sale deed. The suit was, therefore, in time.

Subbaroya v. *Rajagopala*, (1914) I. L. R. 38 Mad. 887, referred to.

Sigamani Pandithan v. *Munibadra Nainar*, (1925) 49 M. L. J. 668, followed.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tiruvarur in S. C. S. No. 38 of 1928.

S. Nagaraja Aiyar and *G. Gopalaswami* for petitioner.

N. Muthuswami Aiyar for respondent.

The Court delivered the following

JUDGMENT.—The plaintiff's (petitioner's) suit brought for damages for breach of the implied covenant of title contained in a sale to her by the defendant (Ex. A), dated 8th December, 1916, has been dismissed by the learned Judge on the ground of limitation. There is no question that if this opinion is not correct the petitioner is entitled to a decree. By the sale (Ex. A) the defendant purported to sell to the petitioner (plaintiff) $4\frac{1}{2}$ cents of land of which from the previous litigation it appears that he gave possession of $1\frac{1}{2}$ cents. For the other 3 cents there were disputes between herself and her vendor on the one hand and one Subbiah Pillai, the holder of an adjacent land, who claimed it under another title, on the other. In 1920 two suits were brought, one by Subbiah Pillai against the petitioner's sons (since tried as O. S. No. 29 of 1921 in the Court of the District Munsif, Tiruvarur) in which Subbiah Pillai sued to remove the petitioner's sons from their admitted occupation of a shed (*saipu*) and to recover one cent of land on which it stood on the ground that they were mere licensees; and the other brought by this petitioner against Subbiah Pillai and her vendor (subsequently tried as O. S. No. 168 of 1921 in the same Court) in which the petitioner sought to recover the 3 cents of land of which she

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alleged she had been given possession by her vendor but on which Subbiah Pillai had trespassed. The two plots were apparently near each other. In the result both suits were dismissed on the finding in Subbiah Pillai's suit that the petitioner and her sons had been occupying the shed and the land on which it stood in their own right for a long time; and in the petitioner's suit that Subbiah Pillai had likewise been in occupation of the 3 cents of land along with some neighbouring land in his own right for a long time. This decision of the District Munsif against the petitioner was pronounced on 23rd December, 1921, and the decision in appeal confirming it by the learned District Judge of Negapatam on 29th January, 1923. This suit was filed on the 4th January, 1928, when the Court re-opened after Christmas, that is, the last day on which the suit could be brought if the proper period of limitation is six years and the starting point is taken as 23rd December, 1921. The learned Judge has held that the suit is barred by limitation on the ground that it falls within the first of the three classes of such suits mentioned by Seshagiri Aiyar, J., in *Subbaroya* v. *Rajagopala*[1]. He has held that the Article properly applicable is 116. But he has held that the period of limitation begins to run in this case on the date of the sale deed (Ex. A) and not as contended by the plaintiff on the date of the decision in O. S. No. 168 of 1921, namely, 23rd December, 1921.

As a result of a series of decisions of this Court of which it is sufficient to refer to *Arunachala* v. *Ramasami*[2], *Patrachariar* v. *Alamelumangai Ammal*[3] and *Sigamani Pandithan* v. *Munibadra Nainar*[4] it cannot be doubted that the provision of the Limitation Act applicable is Art. 116. It was contended that the proper Article is Art. 62 or 97, and the decision in *Subbaroya* v. *Rajagopala*[1] was relied upon. The facts of that case were different and the grounds of decision of Seshagiri Aiyar, J., who decided it in the first instance and of the Appeal Bench who confirmed his decision are also not identical. Whereas Seshagiri Aiyar, J., took the view that Art. 116 was applicable to the case, the Bench who heard the appeal confirmed his decision on the ground stated by Miller, J., in

1. (1914) I. L. R. 38 Mad. 887 at 889.
2. (1914) I. L. R. 38 Mad. 1171: 27 M. L. J. 517.
3. (1926) 25 L. W. 11.
4. (1925) 49 M. L. J. 668.

Ramanatha Aiyar v. *Oshaloor Pathirisseri Raman Nambudripad*[1] that the proper Article to be applied was 97. That was perhaps appropriate to the facts there which were that the plaintiff got possession under a sale deed and remained in possession until evicted in 1911 and the want of title was established by litigation which ended in 1918. In these circumstances it was held that the case can be properly described as one for money paid on an existing consideration which afterwards failed when the litigation ended.

In *Arunachala* v. *Ramasami*[2] the plaintiff who took a sale deed in 1904 was unable to get possession at all and brought the suit in 1910, but was unable to get it. The question was whether the plaintiff could recover the money paid. It was held by a Bench after a full examination of the authorities that the proper Article to be applied is 116. That decision applies to this case.

The next point is when does the period begin to run. According to the Article it begins to run when the contract is broken. As to this in the facts of this case I find it impossible to agree with the learned Judge that this case falls within the first of the three classes mentioned by Seshagiri Aiyar, J., in *Subbaroya* v. *Rajagopala*[1]. If it is necessary to adopt the classification mentioned by the learned Judge it appears to me that this is a case falling within his class (*c*) " where though the title is known to be imperfect the contract is in part carried out by giving possession of the properties". The first class is where there was no title to convey and the vendee has not been put in possession either. In the present case, out of 4¼ cents of land the plaintiff did get possession of 1½ cents and had to sue only for the rest, and that appears to be what the learned Judge intended in his class (*c*). However that may be, there is authority for saying that even in cases where the purchaser is unable to get possession and has to litigate against third parties in order to get it, the contract is broken, not always, and in all cases necessarily, on the date of the sale deed, but at the earliest date when a Court decides that the vendor has no title. It is not uncommon for vendors out of possession to sell their lands and if the parties knowing that immediate possession cannot be

1. (1913) 14 M. L. T. 524.
2. (1914) I. L. R. 38 Mad. 1171: 27 M. L. J. 517.
3. (1914) I. L. R. 38 Mad. 887.

Thillaikannu Achi v. Sheik Abdul Kadir Rowther.

given and may have to be obtained by a suit against a third party agreed to these terms, there is no reason to think that the contract is immediately broken if possession is not immediately given. In such a case the contract can reasonably be said to be broken only when it is found as a result of the suit against the stranger known to be in possession that the vendor has no title. *Sigamani Pandithan* v. *Munibadra Nainar*[1] was a case of that character. The plaintiff to whom the whole of some property was sold but was not given possession was able to get possession of only one-half of it after a suit and it was held by Devadoss, J., in that case that the Article of limitation applicable is Art. 116, and also that the period of limitation begins to run on the date when the Court first held that the vendor had no title to the half of which the plaintiff was refused possession. For this the authority relied upon was the decision of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[2]. Applying this to the present case it seems to me that the breach should not be held to have occurred on the date of the sale deed as held by the learned Judge. Apparently both the vendor and the purchaser were in the belief that the 3 cents for which the suit had to be brought were in the hands of Subbiah Pillai and would be recovered from him, and though the vendor and the purchaser did appear on the opposite side in the Court it cannot be denied that, at any rate, as far as the title to the land was concerned, they were both supporting the same case; and it was only when the suit was dismissed that it can reasonably be said, in the facts of this case, that the contract was broken. I therefore think that the better view is that the starting point of limitation in this case must be taken as the date of the decision already mentioned, namely, 23rd December, 1921. If so, the suit was not barred.

In that view the sum of Rupees One Hundred was clearly due, and there will be a decree for that amount with proportionate costs in both Courts.

S. R. *Petition allowed.*

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1. (1925) 49 M. L. J. 668.
2. (1918) L. R. 46 I. A. 52: I. L. R. 46 Cal. 670: 36 M. L. J. 557 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD WRIGHT, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Jnanendra Mohan Bhaduri and another .. *Appellants**

v.

Rabindra Nath Chakravarty .. *Respondent.*

P. C. — Jnanendra Mohan Bhaduri *v.* Rabindra Nath Chakravarty.

Arbitration Act (IX of 1899), S. 15—Award, execution of—"Decree," if made on the award, a nullity and incapable of execution as such—Application to execute such decree may be treated as one for execution of the award.

Matters in difference between the parties were referred to arbitration, and on the award being filed in the High Court, Calcutta, the learned Judge sitting on the Original Side passed a decree on the 14th February, 1919, in terms of the award.

Held, on an application by the respondent for execution of the said decree, that under the Indian Arbitration Act, 1899, S. 15, unless the Court remits the award to the reconsideration of the arbitrators or umpire, or sets it aside, the award when filed in Court is enforceable as if it were a decree of the Court, and (unlike the provision in para. 21, Second Schedule, Civil Procedure Code), the Act does not provide for making a decree on the award. The decree of 14th February, 1919, was, therefore, passed without jurisdiction and a nullity, and was incapable of execution *qua* decree.

Held, further, that the respondent's application, though in form for execution of the decree, could be treated in substance as one for execution of the award.

Judgment of the High Court, Calcutta (58 Cal. 1018), affirmed.

Appeal No. 106 of 1931 from an order of the High Court, Calcutta, dated the 11th December, 1930, reversing an order of the Subordinate Judge of Hooghly, dated the 29th June, 1929.

De Gruyther, K.C. and *J. M. Pringle* for appellants.

Dunne, K.C. and *J. M. Parikh* for respondent.

19th December, 1932. Their Lordships' judgment was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—This is an appeal from an order of the High Court of Judicature at Fort William in Bengal, dated the 11th December, 1930, which set aside an order of the Third Subordinate Judge of Hooghly, dated the 29th June, 1929, and directed that an application for execution of a decree presented by the respondent to the Court of the Subordinate Judge be entertained as an application for execution of an award.

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*P. C. Appeal No. 106 of 1931. 19th December, 1932.
Bengal Appeal No. 29 of 1931.

P. C.

Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarty.

Sir Dinshah Mulla.

The appellants are two of the executors of the will of Rajendra Lal Goswami, who died on the 21st August, 1917. The testator's widow, Annapurna Debi (since deceased), was also an executrix of the will. The will is dated the 18th November, 1916, and it was admitted to probate on the 19th December, 1917.

The appellants are residuary legatees under the will. The respondent, the testator's widow and Radhika Lal Goswami are beneficiaries under the will.

Disputes arose as to the construction of the will, and by an agreement in writing, dated the 22nd December, 1917, the matters in difference were referred to the sole arbitration of Byomkesh Chakravarty. The respondent was then a minor, and was represented by his father and natural guardian, Bhawani Charan Chakravarty.

The arbitrator made his award on the 29th July, 1918. The terms of the award more particularly affecting the respondent are contained in clauses 6 and 10. By clause 6 it was declared that the gift to the respondent of the properties mentioned in Schedule *Ga* to the will was good subject to a charge for the payment of Rs. 13,063-12-0, and the executors were directed to make over the properties and all documents relating thereto, together with all accounts from the date of the death of the testator, to the respondent's father or such other person as may be appointed guardian of his person and property. By the same clause, it was declared that the respondent was entitled to a life policy mentioned in paragraph 13 of the will. By clause 10, the executors were directed to make up an account of all sums received and spent by them, and to hand over the balance to such persons as were declared entitled thereto.

On the 1st August, 1918, the arbitrator filed his award in the High Court at Calcutta. The first appellant filed objections to the award, but the parties eventually came to terms, and the award was modified by two agreements. The only modification which might possibly have affected the respondent was that contained in clause 5 of the first agreement, by which it was provided that the properties should be handed over to the respondent's father on his giving security for Rs. 12,000 to the satisfaction of the Registrar of the High Court, but this was not carried into effect.

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The first appellant afterwards applied for a decree to the High Court at Calcutta, and on the 14th February, 1919, a decree was passed by consent of parties by which it was directed that "the said award as modified by the said terms of settlement ought to be carried into effect, and the same is ordered and decreed accordingly." Copies of the award and of the agreements were annexed to the decree. The decree was headed "In the matter of an Arbitration and in the matter of the estate of Babu Rajendra Lal Goswami."

No steps were taken by the respondent's father or any other person on his behalf during his minority in the matter either of the award or decree. The respondent attained majority in November, 1925, and in July, 1926, he took out a notice of motion headed in the same way as the decree. The notice is not printed in the record, and their Lordships do not know the precise terms thereof. It came up for hearing before Greaves, J., and the learned Judge, it would appear, made an order in terms of the notice. The order, however, was set aside on appeal on the ground that the reliefs claimed were such as could not be granted on a notice of motion made under the Indian Arbitration Act.[1]

In 1927, the testator's widow applied for execution of the decree of the 14th February, 1919, against the appellants. The Subordinate Judge granted execution, and his order was confirmed on appeal by the District Judge. The appellants appealed to the High Court. The High Court held[2] that the decree was a nullity, but that the application might be regarded as one for execution of the award, and passed orders accordingly.

On the 15th February, 1928, the High Court, on the application of the respondent, transmitted the decree of the 14th February, 1919, for execution to the District Judge of Hooghly. On the 22nd February, 1928, the respondent made the present application to the Third Subordinate Judge of Hooghly for execution of the decree against the appellants. The application was in the form prescribed by O. 21, R. 11 of the Code of Civil Procedure. In column 10, which relates to "the mode of assistance sought for from the Court," it was stated : "It is prayed that possession may be delivered to the decree-holder

1. *See* 31 C. W. N. 517, where the judgment of the Appellate Court is reported.—K. J. R.

2. *See* 34 C. W. N. 268.—K. J. R.

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of the properties mentioned in the schedule below according to the terms of the award, and orders may be passed," etc. On the 7th June, 1928, the appellants filed objections to the application.

The Subordinate Judge passed an order on the 29th June, 1929, dismissing the application on the preliminary ground that the decree was a nullity, as the Court which passed it had no jurisdiction, and it could not, therefore, be executed. The respondent appealed to the High Court at Calcutta. The learned Judges of the High Court agreed with the Subordinate Judge in holding that the decree was a nullity, but held that the application might be treated as one for execution of the award, and directed that it should be entertained as such. It is from that order of the High Court that the present appeal has been brought to His Majesty in Council.

The powers of a Court in proceedings under the Indian Arbitration Act are defined by the Act. Section 11 provides for the filing of an award by the arbitrators in Court, section 13 for remitting it to the reconsideration of the arbitrators, and section 14 for setting it aside. By section 15 it is enacted that "an award on a submission on being filed in the Court in accordance with the foregoing provisions shall (unless the Court remits it to the reconsideration of the arbitrators or umpire or sets it aside) be enforceable as if it were a decree of the Court." No order was made in the present case for remitting the award to the reconsideration of the arbitrator, nor was the award set aside. The award, therefore, remained filed in Court, and it was enforceable as if it were a decree of the Court.

The Act does not contain any provision for making a decree on an award such as is contained in Schedule II, paragraph 21 of the Code of Civil Procedure. Such a decree, if made, is one without jurisdiction, and therefore a nullity.

Their Lordships agree with the view taken by the Courts in India that the decree of the 14th February, 1919, was passed without jurisdiction, and was, therefore, incapable of execution as such.

The respondent, however, as a party to the arbitration would be entitled under the Act to enforce the arbitrator's award through the Court in exactly the same way as if it was a decree. If, therefore, there was an existing award in favour

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of the respondent, the objection to his application was one of form only and not of substance, and their Lordships think that it would be in the discretion of the High Court to treat it in the way they did.

The appellants contend that the award as an award had ceased to exist by reason of the variation of its terms to which some of the parties had agreed. But there was, in fact, no variation of the rights of the respondent, nor can he as a minor be regarded as consenting to the variations with which he was not concerned. There was, therefore, no reason why he should not enforce the award so far as it gave him rights against the appellants.

On the whole, their Lordships are of opinion that the appeal fails, and ought to be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the respondent's costs of the appeal.

Solicitors for appellants: *Watkins and Hunter.*

Solicitors for respondent: *W. W. Box & Co.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

Sarkaru Munisami Achari and others .. *Appellants** (*Defendants 2 to 6*)

v.

Chikka Veerappa Setti .. *Respondent* (*Plff.*).

Munisami Achari v. Veerappa Setti.

Limitation Act (IX of 1908), Art. 182 (5)—Execution—Decree-holder application for transfer—Objection on grounds of satisfaction of decree by judgment-debtor—Counter-petition—Affidavit in support—Vakalat—Batta—Whether steps-in-aid of execution—Limitation whether saved.

A decree-holder put in an execution application on 20th August, 1923, under O. 21, R. 16, Civil Procedure Code, for transfer of the decree to another Court for execution and the defendants pleaded satisfaction of the decree. The Court noted on 5th December, 1923, "I want to examine the decree-holder. He should appear with all his account books of 1920 and onwards. Defendants also should bring their accounts. Batta in 3 days." The decree-holder on the same day put in an affidavit praying for execution, in which he denied account books having been kept by him; and the transfer was ordered on 7th December, 1923 The decree-holder filed the present execution application on 22nd November, 1926. It having been considered barred by limitation he based his contentions on the three steps, namely, (1) batta application, (2) a vakalat filed by him in the appeal by the defendants, and (3) the affidavit in support of his own counter-petition, on the question whether they were steps-in-aid of execution and as such would save limitation,

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*C. M. S. A. No. 114 of 1929. 13th December, 1932.

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Held, (*i*) that the affidavit could not be a step-in-aid;

(*ii*) that if the counter itself, the most important document without which none of the subsequent proceedings in execution could take place, was not a step in execution, none of the subsequent steps in removing the obstruction would be steps-in-aid. Hence filing batta for witnesses in the enquiry would not be a step-in-aid of execution; and

(*iii*) that the filing of vakalat stood on the same level, as the appeal itself in which it was filed was only a continuation of the previous proceeding.

Case-law reviewed.

Appeal against the order of the Subordinate Judge of Chittoor, dated 8th October, 1928 and made in A. S. No. 35 of 1928 (A. S. No. 282 of 1927, District Court, Chittoor) preferred against the order of the Court of the District Munsif of Madanapalle, dated 24th June, 1927 and made in R. E. P. No. 787 of 1926 in O. S. No. 434 of 1919.

B. Somayya for appellants.

A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—The decree-holder in O. S. No. 434 of 1919 on the file of the District Munsif of Madanapalle put in an execution application on 20th August, 1923, under O. 21, R. 16, Civil Procedure Code, for the transfer of the decree to the District Munsif's Court, Chittoor, for execution. Defendants 3 and 6 contested the application saying that the decree was fully satisfied.

What took place on the execution application is as follows: —An issue was framed on 6th October, 1923, "Is the decree fully satisfied? If not, what is due?" After various adjournments the Court noted on 5th December, 1923, "I want to examine the decree-holder. He should appear with all his account books of 1920 and onwards. Defendants also should bring their accounts. Batta in 3 days." The decree-holder on the 5th December, 1923, put in an affidavit, Ex. C, in which he said he had not kept his day books and ledger with him and stated "as prayed for in the petition, orders are necessary for taking out execution." Transfer was ordered on 7th December, 1923. The present execution petition was filed on 22nd November, 1926. The executing Court found it barred by limitation. The lower appellate Court found it not barred. Hence this appeal. The learned District Munsif did not

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discuss the steps which were alleged to save limitation but the lower appellate Court has fully discussed them. Three steps were relied on before it: the first was the batta application, Ex. B, put in on the 27th November, 1923; the second was a vakalat put in in the appeal preferred by the judgment-debtors against the transmission of the decree; and the third was the affidavit already mentioned, Ex. C. The first two matters the learned Subordinate Judge did not find to be steps-in-aid; and the third he found was such. I shall, therefore, first deal with the third ground on which the appeal was allowed although in point of fact in arguing the case before me the respondent relies rather on the first ground. I fail to see how Ex. C can be a step-in-aid. The plaintiff had been ordered to produce his accounts and was unable or unwilling to do so. All that he had to tell the Court was that he was not producing his accounts. The prayer to the Court to proceed with the execution of his petition was entirely unnecessary since the Court was bound to dispose of it. There are two cases of this Court bearing on the question. One is *Rangachariar* v. *Subramania Chetty*[1], a case very similar to the present case which follows *Masilamani Mudaliar* v. *Sethuswami Aiyar*[2] and dissents from *Abdul Kader Rowther* v. *Krishnan Malaval Nair*[3]. It was sought to distinguish this case on the ground that an order for transmission had already been passed in that case. But even in that case apparently though the order for transmission had been passed what the petitioner asked the Court to do was actually to send the records to the other Court. In the case in *Masilamani Mudaliar* v. *Sethuswami Aiyar*[2] an assignee of a decree filed a petition for execution on 13th July, 1911, and an order of attachment was made on the day of hearing, 12th August, 1911; the petition itself was dismissed on 26th August, 1911, as he failed to pay batta. A fresh application was filed on 10th August, 1914. It was held that though in the above circumstances the Court might presume that the decree-holder made an oral application on the day of hearing to proceed with the execution, such application was not a step-in-aid of execution. It was only on the supposition of such an application for execution being made on 12th August, 1911, that limitation could have been saved at all. It is clear that the

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1. (1920) 12 L. W. 9. 2. (1916) I. L. R. 41 Mad. 251: 33 M. L. J. 219.
3. (1913) I. L. R. 38 Mad. 695. 26 M. L. J. 433.

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application was made before the orders were passed. Further, *Krishna Patter* v. *Seetharama Patter*[1] and *Ramaswami* v. *Veeranna*[2] concur with this view. Other Courts no doubt have held a different view. *Vide,* for instance, *Ram Lal* v. *Udit Narain Singh*[3]. The learned Advocate for the respondent has sought to uphold the appellate Court's decision on the ground that the batta memo was a step in execution. In *Kuppuswami Chettiar* v. *Rajagopala Aiyar*[4] it was laid down that a statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the decree is not a step in execution. In the other case, *Krishna Patter* v. *Seetharama Patter*[1] it was held that it was immaterial whether an execution application was or was not pending at the time. As noted in that case the decisions in Calcutta appear to be conflicting. There are cases of Allahabad directly contrary to the view taken by Madras. (Vide *Muhammad Siddiq Khan* v. *Lala Misiri Lal*[5] and *Abdul Quddus* v. *Sayed Ahmad Husain*[6].) Lahore takes a different view. (*Umar Din* v. *Ghulam Muhammad*[7].) But it is argued that the authority in *Kuppuswami Chettiar* v. *Rajagopala Aiyar*[4] and *Krishna Patter* v. *Seetharama Patter*[1] has been shaken by *Vapu Rowther* v. *Sivakataksham Pillai*[8]. I do not find anything in that case which shakes the previous ones. The question there was whether an application for leave to bid and to set off the price against the decree amount is a step-in-aid of execution. The learned Judges held that it was. Venkatasubba Rao, J., refers to *Dalel Singh* v. *Umrao Singh*[9] on the point as to whether a mere application to bid would be a step in execution. This point is not covered by any Madras decision and the learned Judge admits that it does not really arise but that he is disposed to agree with the Allahabad decision. It was argued that the learned Judge dissented from the position taken up in *Krishna Patter* v. *Seetharama Patter*[1] that the step must be one which the Court is asked to take. The learned Judge says on this point:

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1. (1926) I. L. R. 50 Mad. 49: 51 M. L. J. 480.
2. (1927) 53 M. L. J. 766.
3. (1927) I. L. R. 2 Luck. 419.
4. (1921) I. L. R. 45 Mad. 466: 42 M. L. J. 303.
5. A. I. R. 1922 All. 432.
6. A. I. R. 1923 All. 415.
7. A. I. R. 1927 Lah. 653.
8. (1929) I. L. R. 53 Mad. 390: 58 M. L. J. 406.
9. (1900) I. L. R. 22 All. 399.

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"In one sense this is perfectly true. The learned Counsel contends that the step which the Court is asked to take must be something like attaching or selling property. I am not prepared to place this restricted view upon the words."

The learned Judge does not say that the Court has not to be asked to take some step. In any case the observation is *obiter*. The other learned Judge, Madhavan Nair, J., refuses to express any opinion as to whether a mere application for leave to bid in auction is a step in execution. I find nothing in the case which shakes the authority in *Kuppuswami Chettiar* v. *Rajagopala Aiyar*[1] and *Krishna Patter* v. *Seetharama Patter*[2]. I think it is unnecessary to quote the decisions of other Courts on this vexed matter in regard to which Venkatasubba Rao, J., has remarked that there is an extreme conflict of view in the decided cases which fail to disclose even a principle of a general or uniform application. He says:

"The wording is so uncertain that it leads to the spending of efforts in barren and fruitless discussion and a good deal of time of the Court is wasted."

He suggests that the "Legislature may well with the aid of the decided cases catalogue the applications which, in its opinion, ought to serve as steps-in-aid of execution." I will therefore merely note some Madras cases. *Raman Chetty* v. *Ramaswami Pillai*[3] was a case of batta memo for arrest. *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[4] was an application for sale proclamation. *Govindaswami Pillai* v. *Govinda Padayachi*[5] was a batta memo to attach properties. It was sought to be argued that while the counter-application to remove the obstruction caused by the judgment-debtors who stated that the decree was satisfied may not be a step in execution to file batta for witnesses in the enquiry necessitated by this plea would be a step-in-aid of execution. I entirely agree with the reasoning of the learned Subordinate Judge, that if the counter itself, the most important document without which none of the subsequent proceedings in execution could take place is not a step in execution, none of the subsequent steps in removing the obstruction can be steps-in-aid.

The last matter relied on as a step in execution, namely, the vakalat filed by the respondent in the appeal appears to me to

1. (1921) I. L. R. 45 Mad. 466: 42 M. L. J. 303.
2. (1926) I. L. R. 50 Mad. 49: 51 M. L. J. 480.
3. A. I R. 1928 Mad. 563.
4. (1905) I. L. R. 28 Mad. 399.
5. (1925) 48 M. L. J. 678.

Munisami Achari v Veerappa Setti.

stand on the same level as the appeal was only a continuation of the previous proceeding and the vakalat is filed to oppose it. Only one reported case on the matter was quoted in *Brij Nath Sahai Singh* v. *Hari Charan Ray*[1]. It was there held that the defending of an appeal preferred by the judgment-debtor in execution proceedings is not a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act. That decision is therefore against the respondent and it is the more noticeable as coming from the Patna High Court which in other matters takes a more favourable view than Madras with regard to steps for the removal of obstruction being steps-in-aid. It has been suggested to me that I should refer the matter to a Bench but sitting as a single Judge I can find no conflict of authority in Madras on the first and third points dealt with by the Lower Appellate Court. As stated by Ayling, J., in *Kuppuswami Chettiar* v. *Rajagopala Aiyar*[2]:

> "In a matter like limitation certainty is the first desideratum: it matters comparatively little whether a decree-holder is allowed 3 years or 10 to execute his decree so long as he knows for certain when the time allowed him will come to an end."

The Bench decisions of this Court having been uniform with regard to two of the grounds raised I see no reason to make a reference.

With regard to the other ground, "the affidavit filed in appeal," it seems that, following the principle laid down by the Madras High Court, the decision must also be against the respondent and, as I pointed out, the Patna High Court which takes a view favourable to the executing decree-holder is here against him. The appeal must, therefore, be allowed with costs and the execution petition dismissed.

K. C. *Appeal allowed.*

1. (1918) 48 I. C. 187.
2. (1921) I. L. R. 45 Mad. 466: 42 M. L. J. 303.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BARDSWELL.

P. S. Anantanarayanan .. *Petitioner**.

Ananta-narayanan, *In re.*

Penal Code (XLV of 1860), S. 71—Criminal Law Amendment Act (XVI of 1908), S. 17 (i)—Ordinance for the Prevention of Molestation and Picketing (Ordinance V of 1932) S. 4—Charge of picketing foreign cloth shops—Conviction—Two separate sentences—Legality of.

Where the two accused, one of them President and the other a member of the Congress Committee, were charged with and found guilty of the offence of picketing foreign cloth shops, punishable alike under S 17 (*i*) of the Criminal Law Amendment Act, 1908 and S. 4 of Ordinance V of 1932 and were awarded separate sentences under each count,

Held, that the reference to their membership of the Congress Committee was only by way of description and was not intended to add a separate charge of their having been members of an unlawful association; that the only offence involved was picketing though punishable under two separate provisions of law and that the awarding of two separate sentences for the same offence under each count was not legal.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and Section 107 of the Government of India Act praying the High Court to revise the judgment of the Court of the Joint First Class Magistrate of Chingleput, dated 14th March, 1932, in C. C. No. 24 of 1932, convicting and sentencing the accused therein P. S. Srinivasan and P. R. Raghuraman.

K. S. Jayarama Aiyar and *G. Gopalaswami* for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is a petition put in not by, but on behalf of, two persons, who have been convicted by the First Class Joint Magistrate of Chingleput of offence punishable under S. 17 (1) of the Criminal Law Amendment Act, 1908 and S. 4 of Ordinance V of 1932. The point taken in this petition is that they have in fact being convicted only of one offence, that of picketing, which can fall equally under S. 17 (1) of the Criminal Law Amendment Act and under S. 4 of the Ordinance and that, therefore, the Joint Magistrate in awarding them separate sentences for the conviction under each count has acted illegally with reference to S. 71, Indian Penal Code.

Under Section 17 (1) of the Criminal Law Amendment Act a person can be punished if he is a member of an unlawful association, or for in any way assisting in the operation of any such association. By Section 4 of Ordinance V of 1932, which is known as the Ordinance for the Prevention of Molestation

*Cr. R. C. No 743 of 1932. 25th October, 1932.
Cr. R. P. No. 693 of 1932.

Anantanarayanan, *In re.*

and Picketing, a person can be punished for molestation. The judgment of the Magistrate refers to the two accused as having been respectively President and member of the Taluk Congress Committee, Conjeevaram and of the District Congress Committee of Chingleput; and it has been suggested by the learned Public Prosecutor that the conviction under the Criminal Law Amendment Act may have been for their being members of an unlawful association which would be a separate offence from that of picketing. It has been proved by evidence that the Taluk and District Congress Committees in question have been notified by Government as unlawful association. In order to make clear the matter the records of the case have been sent for and scrutinised.

The particulars of the accusation stated against the 1st accused have thus been set out by the Joint Magistrate: "Whereas it appears that you, Dr. P. S. Srinivasa Iyer, being the President of the Taluk and District Congress Committees of Conjeevaram and Chingleput respectively, which have been declared to be unlawful associations by the Government under S. 16 of the Criminal Law Amendment Act, 1908 and in spite of a warning from the District Magistrate to desist from activities in furtherance of the purposes of the said unlawful associations, did, at 12-20 P. M., on 14th March, 1932, in furtherance of the purposes of the said unlawful associations, picket foreign cloth shops at Hodgsonpet, Conjeevaram and thereby committed an offence under S. 17 (1) of the Criminal Law Amendment Act, 1908; and that you, by doing the said picketing, committed the offence of molestation as defined in Section 3 of Ordinance V of 1932 punishable under Section 4 of the said Ordinance; show cause why you should not be convicted under S. 17 (1) of the Criminal Law Amendment Act of 1908 and Section 4 of the Ordinance V of 1932. Do you plead guilty or not guilty?" The accusation that was read to the 2nd accused is just the same as that read out to the 1st accused except that he is described as a member of the Congress Committees and not as the President.

It is true that in both these statements of accusation the fact of the accused being either President or member of the Taluk and District Congress Committees is mentioned, but I am satisfied that this is only by way of description. This is shown by the use of the word "being". Had they been charged with the

offence of being members of an unlawful association the accusation should run " that you were". This, however, is not a case in which one has to decide by a meticulous examination of the language that is used, as from what follows later it is perfectly clear that the offence under S. 17 (1) was that of picketing foreign cloth shops and that the offence charged under the Ordinance was that of molestation in the said picketing. Therefore, under each section alike it was the offence of picketing with which the two accused were charged. The matter is so very clear that it is hardly necessary to mention anything that might make it even clearer; but for the sake of emphasis I will point out that what was read by the Joint Magistrate to the accused as to the accusation is perfectly a paraphrase of what is stated in the charge-sheet, though in the charge-sheet in the place of the word "being" we have "who are". The conclusion of what appears in the charge-sheet shows that the charge against the accused was one of picketing which is shown as falling both under the Act and under the Ordinance. And, again, in the first information report nothing is mentioned about these accused being members of an unlawful association, but it is merely stated that they were guilty of picketing and thereby committed offences under the Act and under the Ordinance.

Before the Magistrate the first accused declined to plead either way and so also did the second accused. The second accused, however, went on to say: "I wish to add, however, that I think I was a member of the Taluk Congress Committee only, as far as I remember, and not of the District Congress Committee." As he had already declined to plead it is clear that in this statement he was only correcting a possible mistake in his description and was not replying to the charge of being a member of an unlawful association, which charge indeed had not been preferred against him.

I find, then, that the two accused have been found guilty of one offence and one only, though it is one punishable under two separate provisions of law. The two separate sentences therefore cannot stand. The convictions are confirmed but the sentence of six months' rigorous imprisonment and of fine of Rs. 200 that has been passed for the conviction under S. 4 of Ordinance V of 1932 is set aside. I understand that they have already undergone imprisonment for six months or more.

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If that be the case, and, if they have no further term of imprisonment to undergo in default of payment of fine, they must at once be released and set at liberty; at any rate, they must be released as soon as their term of six months and any term of imprisonment in default of payment of fine has expired. The fine, if paid, should be refunded to them.

S. R. *Sentence reduced.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON, MR. JUSTICE SUNDARAM CHETTY AND MR. JUSTICE MOCKETT.

Venkatachalam Pillai .. *Appellant* (2nd defendant)*

v.

Sethuram Rao *alias* Lakshmikantha Sastriar and another .. *Respondents (Plaintiff and 1st Deft.).*

F. B. — Venkatachalam Pillai *v.* Sethuram Rao.

Contract of sale—Minor—Stipulation by guardian on behalf of minor-vendor to re-purchase property if vendee desired to re-sell—Agreement whether a completed contract—Whether mutuality of parties existed when guardian acted for minor—Specific performance—Enforceability.

Where during the minority of the plaintiff the suit site belonging to his adoptive father was sold by his natural father as his guardian to the defendant's predecessor and the document of sale contained a stipulation to the effect that " if it happens that you or your heirs have to sell the property to others, then you or your heirs have to sell it to the *plaintiff* or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land," but the defendant sold the land to another, in violation of the above contract, on the questions whether the agreement contained in the sale deed was or was not a completed contract and whether, even in case it was held that there was a completed contract, it would be competent for the guardian of the minor-plaintiff to bind him by a contract for the purchase of the site.

Held, (1) that it must be held on the authority of the Privy Council decision in *Sakalaguna Nayudu* v. *Chinna Munuswami Nayakar*, (1928) L. R. 55 I. A. 243: I. L. R. 51 Mad. 533: 55 M. L. J. 198 (P. C.), that there was a completed contract between the parties on the date of the sale deed itself.

Alagarsami Naidu v. *Kathia Goundan*, 1931 M. W. N. 957 and *Papa Naidu* v. *Munisamy Aiyar*, (1922) I. L. R. 46 Mad. 30: 42 M. L. J. 432, referred to;

(2) that on the authority of the Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, (1911) L. R. 39 I. A. 1: I. L. R. 39 Cal. 232: 21 M. L. J. 1156 (P. C.), it must be held that the contract in question was void for want of mutuality and hence specific performance of such a contract would be unenforceable by either party.

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The validity or the enforceability of such a contract does not depend upon the question whether it was conducive to the benefit of the minor or not.

Raghava Chariar v. *Srinivasa Raghava Chariar*, (1916) I. L. R. 40 Mad. 308: 31 M. L. J. 575 (F. B.), referred to.

Appeal against the decree of the District Court of West Tanjore at Tanjore in A. S. No. 224 of 1927 preferred against the decree of the Court of the District Munsif of Tanjore in O. S. No. 423 of 1926.

K. Desikachariar for appellant.

Salem Ramaswami Aiyar for *T. Appaji Rao* for 1st respondent.

The judgment of the Court was delivered by

Sundaram Chetty, J.

Sundaram Chetty, J.—This Second Appeal arises out of a suit filed by the plaintiff (1st respondent) for specific performance of an agreement to re-sell the plaint-mentioned site. The plaintiff's case is, that the suit site belonged to his adoptive father, that it was sold during the minority of the plaintiff by his natural father as his guardian to 1st defendant's father on 14th December, 1912, under a registered sale deed, that there is a stipulation in the sale deed for the reconveyance of the property to the plaintiff and his heirs for the original price itself, that in violation of that contract the 1st defendant sold the property to the 2nd defendant on 6th December, 1923, that this sale is not binding on the plaintiff and that he is entitled to enforce specific performance of the agreement to re-sell on tendering the purchase money and get a conveyance in his favour. The defendants attacked the plaintiff's claim on several grounds and contended that he was not entitled to specific performance of the alleged agreement. The first Court gave a decree in plaintiff's favour, which was confirmed by the lower appellate Court.

In this Second Appeal preferred by the 2nd defendant, three main contentions have been raised on his behalf in order to show that the plaintiff could not claim specific performance of the plaint-mentioned agreement. The first is, that the agreement contained in the sale deed, Exhibit A, was not a completed contract but only an offer by the vendee to re-sell the property to the vendor, which could become a completed contract only on acceptance of the offer by payment of the price and that the offer having been at an end by the sale of the property to the 2nd defendant, there was no subsisting offer

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for acceptance by the plaintiff and as such there was no contract of which specific performance could be claimed on the date of the suit. The second is, that even if it should be held that there was a completed contract on the date of Exhibit A itself, it was not competent for the guardian of the minor-plaintiff to bind him by a contract for the purchase of the site and as the minor was not bound by that contract, there was no mutuality and consequently specific performance of such a contract is unenforceable in law. The third is, that the stipulation for re-sale as contained in Exhibit A is void as it is obnoxious to the rule against perpetuities as laid down in S. 14 of the Transfer of Property Act.

The covenant in question contained in the sale deed, Exhibit A, is substantially as follows:—

> "If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land."

There is some dispute as regards the construction of this clause. It may be understood to mean that on the happening of the contingency, namely, the determination of the vendee or his heirs to sell the property and thus part with it, the vendee must sell it to the plaintiff or his heirs and that the latter must also purchase it as per the terms of the covenant. In the absence of any words to signify that the repurchase was only optional with the plaintiff or his heirs, it would not be unreasonable to hold that under this contract the vendee was bound to make the offer for re-sale and the vendor was equally bound to buy it, and we are prepared to hold accordingly. The learned District Judge, however, construed this clause in a different way and was of opinion that though there was an obligation on the part of the vendee to re-sell, the vendor's was only an option to repurchase. It is on the basis of this construction that the learned Advocate for the appellant contends that the agreement in question was not a completed contract, but only a standing offer on the part of the vendee. The decision in *Papa Naidu* v. *Munisamy Aiyar*[1] would be on all fours with the present case and doubtless supports his contention. Following the English decisions in *Helby* v. *Mathews*[2]

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1. (1922) I. L. R. 46 Mad. 30: 42 M. L. J. 432. 2. (1895) A. C. 471.

and *Dickinson* v. *Dodds*[1] the learned Judges held that there was a binding offer to re-sell on the part of the vendee and no agreement to buy on the part of the vendor but only an option to repurchase. The view expressed in *Helby* v. *Mathews*[2] that until acceptance of the offer there was no completed contract was adopted. It is also said that an offer would be at an end by the death of the promisor or by the promisor selling it to a third party the sale being known to the promisee before acceptance. A similar question arose for consideration in the case reported in *Alagarsami Naidu* v. *Kathia Goundan*[3]. This case was decided by Ramesam, J., sitting as a single Judge, and he was also a party to the decision in *Papa Naidu* v. *Munisamy Aiyar*[4]. The learned Judge seems to have adopted the same view by construing the contract as one consisting of an undertaking by the vendee to make the offer for re-sale whenever he thought of selling the property, and by stating that the vendor, who had only an option to repurchase, cannot sue for specific performance of the contract but may sue for damages if there was consideration for the contract. But the soundness of this view seems to be shaken by the pronouncement of their Lordships of the Privy Council in an almost similar case reported in *Sakalaguna Nayudu* v. *Chinna Munuswami Nayakar*[5]. In that case, the counterpart to the sale deed provided that the vendee should reconvey the property to the vendor after a period of 30 years from that date, in case the vendor wished to have the property again and upon his paying a sum of Rs. 10,000. It is thus clear that the vendor had the option of repurchasing the property or not. Their Lordships have held that it was not a case of a mere standing offer by the vendee which could ripen into a contract to buy and sell only on the acceptance of that offer by the vendor by tender of the purchase money.

On the other hand, it was distinctly held that there was a completed contract between the parties even on the date of the counterpart document (27th January, 1891) and that the right of the vendee under that contract was assignable to a stranger. This decision of the Privy Council was given in an appeal against the decision in *Munuswami Nayudu* v. *Sagalaguma Nayudu*[6] to which Ramesam, J., was a party. It looks as if this

1. (1876) 2 Ch. D. 463. 2. (1895) A. C 471.
3. 1931 M. W. N. 957. 4. (1922) I. L. R. 46 Mad. 30: 42 M. L. J. 432.
5. (1928) L. R. 55 I. A. 243: I. L. R. 51 Mad. 533: 55 M. L. J. 198 (P. C.).
6. (1925) I. L. R. 49 Mad. 387: 51 M. L. J. 229.

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decision of the Privy Council was not brought to the notice of the learned Judge when hearing the case reported in *Alagarsami Naidu* v. *Kathia Goundan*[1]. We should now take it that the matter is concluded by the decision of the Privy Council, and on the strength of that authority, it must be held that there was a completed contract between the parties on the date of Exhibit A itself, even adopting the construction put upon the covenant in Exhibit A by the lower appellate Court and urged for acceptance by the learned Advocate for the appellant. The plea that the stipulation in question was not a completed contract and therefore specific performance could not be enforced is unsustainable. This disposes of the first point raised by the appellant.

Coming now to the second point, the contention put forward on behalf of the appellant appears to rest on a much firmer ground. The leading authority on this point is the decision of the Privy Council reported in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*[2]. In that case, the guardian of a minor entered into an agreement with another for the purchase of certain immovable property by the minor. The minor after attaining majority sued for specific performance of that contract. Their Lordships have laid down the principle of law in the following passage found on page 237:

> "They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract."

The present case is in our opinion governed by the aforesaid decision. The agreement for re-sale contained in Exhibit A being an executory contract without mutuality, it is unenforceable by either party in a suit for specific performance. An attempt has been made by the learned Advocate for the 1st respondent to get over the effect of this decision, by urging that the first Court has found that this contract was for the benefit of the minor and therefore this fact should enable him to enforce specific performance of the contract. But in the case dealt with by their Lordships of the Privy Council, it was found

1. 1931 M. W. N. 957.

2. (1911) L. R. 39 I. A. 1: I. L. R. 39 Cal. 232: 21 M. L. J. 1156 (P.C).

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that the contract was validly entered into and was for the benefit of the minor and was even ratified by him. Still, their Lordships held that there was no mutuality and on that ground declared the contract to be invalid and unenforceable. The validity or the enforceability of such a contract does not therefore depend upon the question whether it was conducive to the benefit of the minor or not. That being so, the argument on the 1st respondent's side is unacceptable.

It is urged on behalf of the 1st respondent, that inasmuch as there was an undertaking on the part of the vendee to re-sell with only an option on the part of the plaintiff to repurchase, the contract may be deemed to be a unilateral contract with no reciprocal obligations and only in favour of the minor plaintiff. Reference was made to the Full Bench decision of this High Court in *Raghava Chariar* v. *Srinivasa Raghava Chariar*[1]. The specific question decided in that case is that a mortgage executed in favour of a minor who has advanced already the whole of the mortgage money is enforceable by him. It has also been held that a sale to a minor under similar circumstances is quite good. But on a careful perusal of that decision, it is clear that the mere fact that a sale or a mortgage is in favour of a minor is not enough to hold that it is valid and enforceable. Where a mortgage or sale has been effected as a completed transaction in favour of the minor and it does not involve the performance of any onerous act by the minor by reason of any contractual obligation in respect of the sale or mortgage, such a sale or mortgage would not be invalid. This is clearly indicated in the following passage on page 313 in the judgment of Wallis, C.J.:

> " The question then is whether it makes any difference that the transfer in favour of the minor by way of sale or mortgage is made in consideration of a price paid or a loan advanced by the minor. No doubt, according to their Lordships' decision, in such a case, the minor could not bind himself by contract to pay the price or advance the mortgage money; but, when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect."

It is also said by Srinivasa Aiyangar, J., that the transfer in favour of the minor cannot be void, unless the transfer is conditional on the passing of consideration and the consideration did not pass (page 336). If the test laid down in that decision is adopted, the position in the present case is this. In

1. (1916) I. L. R. 40 Mad. 308: 31 M. L. J. 575 (F. B.).

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the first place, this is not a case where a registered conveyance has been executed in favour of the plaintiff in pursuance of the original contract. On the strength of that contract, the plaintiff seeks to get a conveyance by specifically enforcing that contract. Even granting that under the contract an option to repurchase was reserved to him, want of mutuality must be judged as on the date of that contract. On exercising his option in favour of the repurchase, he has to pay the price mentioned in Exhibit A and also pay such price as may be determined by arbitrators in respect of any building constructed on the land. That being so, how can it be said that under this contract the vendee should simply execute a reconveyance in favour of the plaintiff who has no sort of corresponding obligation? It is true that no building was constructed upon the land and the necessity for payment of the price as fixed by arbitrators has not arisen, but still the plaintiff has to pay the original price for the site. That being so, the Full Bench decision in *Raghava Chariar* v. *Srinivasa Raghava Chariar*[1] is of no avail to the plaintiff. On the authority of the Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*[2] it must be held that the contract in question is void for want of mutuality and specific performance of such a contract is unenforceable by either party.

The plaintiff's claim must fail on the aforesaid short ground, and it is therefore unnecessary to discuss the third point raised on behalf of the appellant. If the contract embodied in Exhibit A does not create an interest in immovable property, as is clear from the statutory provision in S. 54 of the Transfer of Property Act, the case cannot come under S. 14 thereof. There is some conflict of judicial opinion on this point and several decisions have been cited at the bar. As the decision on the second point is sufficient for the disposal of this appeal, it is unnecessary to discuss this question.

In the result, the Second Appeal should be allowed as the plaintiff is not entitled to sue for specific performance of the plaint-mentioned agreement, and his suit is therefore dismissed with costs of the 2nd defendant in all the Courts.

K. C. *Appeal allowed.*

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1. (1916) I. L. R. 40 Mad. 308: 31 M. L. J. 575 (F. B.).
2. (1911) L. R. 39 I. A. 1: I. L. R. 39 Cal. 232: 21 M. L. J. 1156 (P. C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE.

Pogaru Ramamurti .. *Appellant** (*2nd plaintiff*)

v.

Sri Rajah Mirja Sri Pushavati Alaka Narayana Gajapatiraju Maharaju Manya Sultan Bahadur .. *Respondent* (*1st defendant*).

Ramamurti v. Narayana Gajapatiraju.

Madras Survey and Boundaries Act (*IV of 1897*), *Ss. 11, 12 and 13—Dispute as to boundaries in a village—Decision of survey officer that the village was Miras Inam—Zamindar of the estate claiming melwaram right over village—Appeal against decision of survey officer—Dismissal—No suit filed to set aside the decision as provided under S. 13—Survey officer's decision whether final*—Res judicata—*Ejectment of kudiwaram tenants whether permissible.*

In a suit for ejectment, the plaintiff claimed to be the Government mirasi karnam of a village within the ambit of a Zamindari estate. The Zamindar (1st defendant) claimed the melwaram right over the land, the other defendants claiming to be the kudiwaram tenants thereof. The village was surveyed by Government in 1904 in the course of survey of the Zamindari estate under Act IV of 1897 and the suit land was then demarcated by the survey officer as Mirasi Inam Against this decision the 1st defendant's representative presented under S. 12 an appeal that the land should have been classed as jeroyati. That appeal was thrown out. The Estate did not file any suit under S. 13 to have that decision set aside. On the points contested (1) whether the decision of the survey officer precluded defendant 1 from resisting plaintiff's claim, and (2) whether the defendants 2 to 12, the kudiwaram tenants, who were not parties to the appeal before the survey officer, could be bound by the survey officer's decision and as such liable to be ejected,

Held, (agreeing with Waller, J., Pandalai, J., dissenting) (1) that the survey officer obviously had jurisdiction to decide anything which it was necessary to decide in order to come to his conclusion, and he obviously could not avoid deciding question of title in the cases.

The Full Bench decisions in *Kamaraju* v. *The Secretary of State for India*, (1888) I. L. R. 11 Mad. 309 (F. B.) and *Muthirulandi Poosari* v. *Sethuram Aiyar*, (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F. B.), are clear authorities for the proposition that such decisions of a survey officer in a boundary dispute are not limited to the mere abstract question of what are the physical boundaries in dispute, but are decisions on matters of title and possession. In all these cases it was held that the decision of a survey officer on all the points is *res judicata* and binding on the parties to the boundary dispute.

There is no real hardship done and there is nothing extraordinary in the decision of an executive officer having the effect of being conclusive on the question of possession, since the civil right of the parties are not injured provided they sue, as in the Act they are directed to sue, within one year of the decision.

Further, that even if there was any substance in the defendant's contention that the original dispute was as to whether the land was Jeroyati or Darmilla Inam, *Chinna Venkatrayudu* v. *Ramamurti*, (1920) I. L. R. 44 Mad. 340: 40 M. L. J. 149, is authority for the proposition that even so it would be

*Letters Patent Appeal No. 125 of 1926. 20th April, 1932.

Ramamurti *v.* Narayana Gajapati-raju.

a boundary dispute within the Act and the decision of the survey officer is therefore final;

(2) that it was rightly held by the Lower Courts that plaintiff was not entitled to eject the kudiwaram tenants (defendants 2 to 12) but entitled only to a decree declaring the melwaram right against 1st defendant.

The melwaram right is a possessory right. It is not accurate to describe it as a mere declaratory right. It is a species of possession, in fact the only kind of possession which, for example, a landlord and estate proprietor under the Madras Estates Land Act can have, and no one has yet dreamt of contending that such a landlord has no possessory right. Hence the plaintiff was entitled to have his possessory right to the melwaram declared against one who had been wrongfully in possession of it. For the same reason the decree for recovery of three years' melwaram from the 1st defendant was correct, since the 1st defendant had been trespassing on the plaintiff's rights as melwaramdar.

Per *Krishnan Pandalai, J.*—The scope and purpose of the Act of 1897 (the material Act in this case) as well as that of 1923 is to consolidate and amend the law relating to survey of lands and settlement of boundary disputes. The power of survey officers is to fix boundaries, *i. e*, demarcate the physical extent of properties by setting up the boundaries between them. They have no power to decide disputes about title, but only disputes about boundaries. They were not intended to be a sort of *quasi* Civil Courts whose decisions operate as *res judicata* in the proper sense as to all matters decided by them or which may inferentially be involved in their decisions.

Appeal under cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Spencer, dated 8th February, 1926 and passed in Second Appeal No. 951 of 1923 preferred against the decree of the District Court of Vizagapatam in Appeal Suit No. 329 of 1920 preferred against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in O. S. No. 37 of 1917.

V. Govindarajachari for appellant.

S. Venkatesa Aiyangar for respondent.

The Court delivered the following

Waller, J.

JUDGMENTS. *Waller, J.*—The appellant has no case whatever on the merits. He relies on an order passed by the Assistant Superintendent of Survey in 1905, on an appeal by the respondent, confirming the demarcation of the survey number in dispute as Mirasi Inam, by which was meant, I presume, a pre-settlement Inam. The real dispute between the parties was whether the land should be demarcated as post-settlement Inam or as part of the ryoti land of the estate. No one could possibly have contended that it was a pre-settlement Inam, in which the Government had any interest. It was an Inam granted by the ryots themselves in 1820, which had been resumed by them even before the year 1873 and the landholder had been allowing the appellant a concession of

Rs. 30 a year on that account. So that, it would seem, the appellant had no case at all, still less a case that the Inam had been granted before the permanent settlement. The decision, however, of the Survey Officer was in his favour and, if he had jurisdiction to pass it, it became final, for the Maharaja did not file a suit within a year to get it set aside. It is contended—and the contention found favour with Spencer, J.—that the Survey Officer's order was passed without jurisdiction as there was no boundary dispute between the parties within the meaning of the Survey and Boundaries Act. As the respondent appealed to that jurisdiction and, failing in his appeal, did not take the proper steps to get the order against him set aside, it seems scarcely to lie in his mouth to urge many years later that there was no jurisdiction and that he was entitled to ignore the order.

The Act does not itself define what is meant by a boundary dispute. It is, I take it, a dispute about the demarcation of a field arising in the course of survey operations. In 1905 the Vizianagram Estate was being surveyed and, in the course of the survey, a dispute arose whether the field in question should be demarcated as an Inam or as part of the ryoti lands of the Estate. The dispute was taken before the Survey Officer under the Act, both parties consenting to his exercising jurisdiction over it. It is true that, strictly speaking, there was no dispute about the dimensions of the survey number itself, but there was a dispute about the boundary and extent of the ryoti land of the Estate—that is to say, whether it did or did not include the field in question. That being so, I find it impossible to say that there was not a boundary dispute within the meaning of the Act. If that were so, the decision of the Survey Officer, however erroneous, became final, as no suit to set it aside was filed within a year. I think that the District Judge was right in his observation that "there was as much a dispute about a boundary in this case, as in that reported in *Muthirulandi Poosari* v. *Sethuram Aiyar*[1].

The appeal was posted for further argument on the question whether there was a boundary dispute. After hearing it, I remain of the opinion that there was here as much a boundary dispute as in *Muthirulandi Poosari* v. *Sethuram Aiyar*[1]

1. (1919) I. L. R. 42 Mad. 425: 36 M. L. . 356 (F. B.).

Ramamurti v. Narayana Gajapatiraju.

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and as in the cases reported in *Kamaraju* v. *The Secretary of State for India*[1] and *Muthammal* v. *The Secretary of State for India*[2].

I find that I had omitted to deal with another contention that found favour with Spencer, J. It was that the suit—being a suit to recover the emoluments of a Karnam's office—was, under S. 21 of Madras Act, III of 1895, not cognizable by a Civil Court. The suit is not one to recover the emoluments of an office, but to eject persons who are alleged to have trespassed on some Inam land, which forms part of the emoluments of the office. Apart from that, I find great difficulty in following the decisions which have laid down that S. 21 of the Act takes suits by holders of offices for recovery of their emoluments out of the jurisdiction of the ordinary Courts. The Act is intended to deal with the succession to certain hereditary village offices and to provide for the hearing of claims to such offices or their emoluments. S. 13 says that "any person"—not, be it observed, any village officer—"may sue for any of the village offices specified in S. 3 on the ground that he is entitled" under the material sections of this and another Act "to hold such office". That is a suit by a claimant to an office for a declaration that he is entitled to succeed to it. The section also provides for suits for recovery of the emoluments attached to such offices. It says that "any person," in other words, a claimant and not a village officer *in case* "may sue for the recovery of the emoluments of any such office on the ground that he is entitled" under the material sections of this and another Act "to hold such office". I am unable to see how the language of the section can apply to a suit by an actual holder of an office to recover the emoluments thereof. Such a person comes into Court as the holder of the office and not as a person claiming to be entitled to hold it. If there could be any doubt about the point, it is removed by the 2nd proviso to S. 13, which runs as follows:—

"If at any time before the completion of the trial of a suit referred under this section for any office or for recovery of the emoluments of any office, it appears to the Collector that the *claimant* is not eligible for appointment under sub-S. (1) of S. 10 or sub-S. (1) of S. 11 of this Act, as the case may be, he must pass an order rejecting the plaint."

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1. (1888) I. L. R. 11 Mad. 309 (F. B.).
2. (1914) I. L. R. 39 Mad. 1202: 27 M. L. J. 529 (F. B.).

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The question of eligibility for appointment could, in relation to a suit for recovery of the emoluments of an office, arise only in the case of a claimant to an office. Such a question could not arise in the case of an actual holder of an office. That being so, it seems to me open to serious doubt whether a suit by the holder of an office to recover the emoluments attached to it is taken by S. 21 out of the jurisdiction of the ordinary Courts.

Since we reserved judgment it has been brought to our notice that a Bench of this Court has held that a decision by a Survey Officer does not make a break in existing possession so as to render ineffective, for purposes of limitation, any adverse possession running at its date. See *Azhagaperumal Pillai* v. *Rasa Pillai*[1]. The Judges thought that their view did not run counter to the decision of the Full Bench in *Muthirulandi Poosari* v. *Sethuram Aiyar*[2]. With great respect, I think that it does. The referring Judges in that case were definitely of opinion that the decision of the Survey Officer made a break in the adverse possession and that the period before the decision could not be tacked on to the period after it so as to make the adverse possession continuous. And the Full Bench did not dissent from their opinion. Even if it be assumed that the two periods can be tacked on to each other, what was the decision of the Survey Officer in this case? That the Inam was a pre-settlement Inam and that sixty years' adverse possession was necessary to establish the title claimed by the Maharaja. The decision was erroneous, but he had jurisdiction to pass it and it holds the field till it has been displaced in the proper way. The land having been demarcated as pre-settlement Inam, it would lie on the Maharaja to shew that he had been over 60 years in adverse possession. All that has been shewn is possession from 1873 till 1917. From either point of view, the contention fails and I would allow the appeal. I should like to add, in regard to the decision in *Chinna Venkatrayudu* v. *Ramamurti*[3], that I concur in Spencer, J.'s criticism of that decision. In the course of the argument, we sent for the printed record, but I was unable to discover from it on what facts or evidence the observations of the Judges were based. I

1. (1931) 62 M. L. J. 399.
2. (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F. B.).
3. (1920) I. L. R. 44 Mad. 340: 40 M. L. J. 149.

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would restore the decision of the District Judge with costs in this and the Lower Court.

Krishnan Pandalai, J.—Though with great reluctance to differ from my learned brother's opinion which I have respectfully considered, I find myself unable to say that Spencer, J., was wrong when he held that there was no such dispute about a boundary as was necessary to make the order Ex. 23 conclusive under S. 13 of the Survey and Boundaries Act of 1897 unless it was set aside by suit filed within a year thereafter. The nature of the dispute can be seen from the appeal petition, Ex. 23 (*a*), by the Vizianagram Samasthanam. The Subordinate Survey Officers had demarcated, *i.e.*, described a particular survey field No. 339, as "subsequent service Inam" meaning post-settlement service Inam, whereas the Zamindar contended that it was no longer service Inam but ryoti (jeroyati) land. There was no dispute about the physical properties or dimensions of the land. The dispute was about tenure or the quality of estate possessed by the parties in the land and it is to be noted that, whichever contention prevailed, the land was part of the Zamindāri. When this dispute was taken in appeal before the Assistant Superintendent of Survey the present appellant (then respondent) admitted, as it is even now admitted in the plaint, that though the Inam was a post-settlement Inam he had lost possession for a great many years and the Zamindar had let out the land as jeroyati to his ryots and made an allowance of Rs. 30 per year to himself as compensation for the loss of the land. The result of the appeal was that the "present demarcation and registration of survey No. 339 as Mirasi Inam was confirmed" by which I understand that it was demarcated as post-settlement hereditary Inam. But the appellant refers to the penultimate paragraph of the order where it is said that the land is Government Service Inam and therefore that the appellant should prove right by prescription for a period of over 60 years. All I can say about this is, that the passage discloses some error or confusion of facts quite against the admitted facts and the contentions of both parties. Whatever these expressions were intended to convey I read the decision as confirming the order appealed against and not as ordering a third alternative, *i.e.*, pre-settlement Inam. This, however, is a detail, the substantial point being that it is abundantly clear that the dispute was not about the boundary of anything but about the tenure

of a specific piece of land—the Zamindar claiming it as ryoti land and the appellant as his Inam. In my opinion the decision in such a dispute by a surveyor is not final under S. 13 of the Survey and Boundaries Act merely because it is placed before him in the course of survey operations and he passes orders thereon. There can be no estoppel on such a point. The only class of orders which derive finality under the Act are those which decide boundary disputes. It is no doubt possible by ingenious use of language to describe a dispute about title as a dispute about boundary—in the sense that when the disputed title is decided the boundary of the successful party's possessions is extended and that of the other diminished. But this is really a play upon words and not what is intended when it is said that the Survey Officer shall have power to determine and record undisputed boundaries and that when a boundary is disputed the Survey Officer shall determine the boundary and record it. (Ss. 9 and 10 of Act VIII of 1923 corresponding to S. 11 (1) and (2) of Act IV of 1897) it is this determination against which an appeal is allowed by S. 12 of the Act of 1897 corresponding to S. 11 of the Act of 1923 and in respect of which the appellate decision shall, unless modified by a decree of the Court, be conclusive as to the right of the dissatisfied party in respect of the boundary of the property surveyed according to S. 13 of the Act of 1897 or conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded according to S. 13 of the Act of 1923. Whether there is or not in any particular case a real dispute about a boundary is to be determined on the facts of the dispute itself. In my opinion when two people dispute title to an ascertained and definite piece of land or to subordinate interests therein the dispute cannot in any proper sense be described as a boundary dispute though as a result of the disputed title being settled the boundaries of the property of one or other of the disputants may be accordingly shifted. If there was a real boundary dispute I can understand that a question of title depending solely on the boundary may become concluded as a necessary logical consequence but not by virtue of the Act. But if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes concluded by a further inference. There

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was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey and his order Exs. G and XXIII being one on a matter beyond his jurisdiction could not become conclusive under the Survey and Boundaries Act.

The further argument has confirmed me in my opinion about the scope and purpose of the Act and of its effect on the case. The scope and purpose of the Act of 1897 (the material Act in this case) as well as that of 1923 is to consolidate and amend the law relating to survey of lands and settlement of boundary disputes. The power of Survey Officers is to fix boundaries, *i. e.*, demarcate the physical extent of properties by setting up the boundaries between them. They have no power to decide disputes about title, but only disputes about boundaries. They were not intended to be a sort of *quasi* Civil Courts whose decisions operate as *res judicata* in the proper sense as to all matters decided by them or which may inferentially be involved in their decisions. Thus two matters must be distinctly borne in mind: (1) the Survey Authorities have no jurisdiction at all in any matter except that of boundaries, and (2) the only effect of their decision on matters within their jurisdiction is not that they have the effect of *res judicata* but that as far as they are boundary decisions they can only be questioned by a suit brought within a certain time—which is quite a different thing. I will not say that some decisions on the Survey and Boundaries Act are not capable of being read as imputing a wider jurisdiction to officers acting under the Act and a more extensive effect to their actual decisions. But I believe that the scope of the Act and the limits of the jurisdiction of Survey Officers and of the effect of their orders are generally recognised as I have stated. In *Kamaraju* v. *The Secretary of State for India*[1] the boundary between the Zamindari and a neighbouring trust of Government land had been settled in 1875 under the Boundaries Act of 1860. The Zamindar, then a minor, was represented before the Survey Superintendent by his estate manager. Later the portion so excluded from the Zamindari was included in a reserve forest under the Madras Forest Act of 1882. The Forest Settlement Officer rejected the claim of the Zamindari to the area excluded

1. (1888) I. L. R. 11 Mad. 309 (F. B.).

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from it by the survey decision. Of the two questions involved, the first, namely, whether an appeal lies to the High Court from a decision of the District Court passed under S. 10 of the Madras Forest Act, is not relevant to this case. But the second question was whether the Zamindar was properly represented in the survey proceedings. It was held that he was. There was no question raised whether there had been a boundary dispute such as to give jurisdiction to the Survey Superintendent for the decision of 1875. The Court simply said that the matter in dispute was *res judicata* and that the Zamindar was bound by the proceedings under the Boundary Act in 1875. This decision is hardly in point on the question before me. Nor can the use of the expression "*res judicata*" be understood as meaning that the Survey Superintendent's decision is *res judicata* in the proper sense in view of the decision of the Privy Council pointing out the distinction between *res judicata* in the proper sense and the statutory prohibition of questioning executive or administrative acts except in a particular way. See *Radhakrishna Ayyar* v. *Sundaraswamier*[1] confirming the decision of this Court in *Radhakrishna Ayyar* v. *Swaminatha Ayyar*[2]. In *Muthammal* v. *The Secretary of State for India*[3] the question before the High Court was whether a Mittadar, against whom the decision of the Boundary Commissioner excluding a certain area from his mitta had become final, could maintain a prayer to the Civil Court to reduce his peishkush proportionately to the excluded area. Sir John Wallis, C. J., held that that question did not arise in view of his opinion on the effect of the boundary decision. He said:

"In these circumstances the decision of the Boundary Settlement Officer that the lands in question did not form part of the Zamindari is *res judicata* according to the decision of the Full Bench in *Kamaraju* v. *The Secretary of State for India*[4] and I think that the ground of the decision, namely, that they never had formed part of the mitta is also *res judicata* as having formed the ground of the decision."

In view of the opinion expressed by this very learned Judge in *Muthirulandi Poosari* v. *Sethuram Aiyar*[5] and *Chinna Venkatrayudu* v. *Ramamurti*[6] the opinion that Survey

1. (1922) L. R. 49 I.A 211: I. L. R. 45 Mad. 475: 43 M. L. J. 323 (P.C.).
2. (1916) 6 L. W. 16.
3. (1914) I. L. R. 39 Mad. 1202: 27 M. L. J. 529 (F.B.).
4. (1888) I. L. R. 11 Mad. 309 (F.B.).
5. (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F. B.).
6. (1920) I. L. R. 44 Mad. 340: 40 M. L. J. 149.

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Officers' decisions operate by way of *res judicata* is open to the remark that it does not recognise the distinction now pointed out by the Privy Council and was perhaps not intended to be understood in that particular sense. The opinion that the effect as *res judicata* of decisions by Survey Authorities extends to the grounds of the decisions also is, in my opinion, not justified by the Survey and Boundaries Act. In *Muthirulandi Poosari* v. *Sethuram Aiyar*[1] there had been a litigation in the year 1900 between the parties, and a decree was passed. There arose a dispute between the parties as to whether that decree conferred the right to a lane to the present plaintiffs. In 1904 this dispute came before the Survey Officers who were surveying the town of Madura. The Survey Officer decided that the lane belonged to the defendant and demarcated it accordingly as part of his property. This decision was not questioned by a suit within a year but the plaintiffs brought a suit in 1913 for an injunction against the defendant alleging that the decree of 1900 had awarded the lane to him, that he was in possession under it both before and after the survey decision and that the defendant had no right to interfere with the plaintiffs' enjoyment. It was recognised that unless there was a boundary dispute the survey officials could not by demarcating a boundary affect title to property. Both the referring Judges, Phillips and Seshagiri Aiyar, JJ., refer to this at pp. 427 and 428 of the report. The question referred was, when a plaintiff's claim has been disallowed under the Survey and Boundaries Act (IV of 1897), but has been in possession of the property, does the decision of the Survey Officer operate as *res judicata* in a subsequent suit for possession? In the opinion of the Full Bench delivered by Sir John Wallis, C. J., he carefully guards himself by premising it with the words "assuming that in this case the boundary was disputed and the dispute was the subject of an order by the Survey Officer under S. 11 of the Madras Act, IV of 1897," and then he stated the opinion that "in that case the order if not reviewed by the appellate authority or questioned by a suit as provided in the section was conclusive as to the rights of the parties and none the less so because the unsuccessful party, who was in possession at the date of the order, was not subsequently ousted from possession." This clearly recognises that to give

1. (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F. B.).

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jurisdiction to a Survey Officer to make an order which shall be conclusive under S. 13 of the Act of 1897 there should be a boundary dispute as stated in the opening words of that section, and all that is meant is that the conclusive character of the order, which according to the section itself relates to the rights claimed in respect of the boundary of the property, is not affected by the unsuccessful party, who was in possession at the date of the order, continuing to be in possession. In *Chinna Venkatrayudu* v. *Ramamurti*[1] the distinction between orders which are final under S. 12 (3) of the Act of 1897 and those which are conclusive of the rights as to the boundary unless set aside by a suit under S. 13 is pointed out by Sir John Wallis himself. In that case a Karnam in the Pithapur Estate had during the survey operations of that estate succeeded in getting the Survey Officers to demarcate as included in his Inam lands the neighbouring jeroyati lands of the Zamindar. Neither the Zamindar nor his agents had appeared before the Survey Officers, and there had been no appeal and no suit to set aside the order. It was pointed out that in the Full Bench case *Muthirulandi Poosari* v. *Sethuram Aiyar*[2] all that was decided was that the Survey Officer's order in boundary cases is conclusive under S. 13 only when there was a dispute and that nothing was stated therein about the effect of the word "final" in S. 12 (3). The effect of S. 12 (3) was held to be to make the boundary final as far as the authorities are concerned but not to preclude land owners from ever afterwards disputing the correctness of the boundary in a Court of Law. The opinion that the conclusiveness of a Survey Officer's order under S. 13 of the Act of 1897 can only arise if there was a boundary dispute was again laid down in *Subramania Mudali* v. *Meenakshi Ammal*[3] and *Municipal Council, Cochin* v. *Bavu Devussi*[4]. It must have been in view of these decisions that in S. 13 of Act VIII of 1923 the words "any party to a boundary dispute before the Survey Officer, and any party to an appeal preferred under S. 12 or to whom notice of such appeal is given, and any person claiming under any such party" which are found in S. 13 of the Act of 1897 have been omitted. Under S. 13 of the new Act all persons to whom notice of orders passed under

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1. (1920) I. L. R. 44 Mad. 340: 40 M. L. J. 149.
2. (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F.B).
3. (1922) 43 M. L. J. 194.
4. (1925) 22 L. W. 671.

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Sections 9, 10 or 11 of the Act has been given are required to get the orders modified by suits within 3 years. This case, however, has to be decided on the words of S. 13 of the Act of 1897.

As to what it is that is concluded by a Survey Officer's decision acting within his jurisdiction, that is in respect of a boundary, the words of S. 13 of the Act of 1897 are that a suit is to be filed to establish the right which the dissatisfied party claims in respect of the boundary of the property surveyed and that subject to the result of such suit such order or decision shall be conclusive. The words of S. 13 of the Act of 1923 are that the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded. In my opinion the effect of both the set of words is the same, and they mean that unless the order is set aside by suit, the boundary as determined is conclusive. As I have already said, if from a particular boundary being conclusively established the right of either party to the intervening space necessarily follows, that will be held concluded not because of the Act but because of the force of logic. The act itself confers no conclusiveness upon anything else but boundaries and says nothing about the right to the property or about its possession. This last point as to possession is clearly stated in *Ashagaperumal Pillai* v. *Rasa Pillai*[1], with which I respectfully agree when it holds that a Survey Officer's decision as to boundary although conclusive as to the boundary does not have the legal effect of terminating the possession of the man who was in possession or of destroying its legal effect if it had already conferred a title upon the possessor or breaking the running of possession in favour of the person in whose favour the boundary is ordered. As pointed out in that decision it would be very extraordinary if the Survey Officer's decision could have such a result which would not follow even a declaratory decree of a Civil Court that a party had or had not title.

I am not satisfied that there was in this case any dispute about any boundary in the proper sense of the term. The dispute was about title. The Survey Officer had no jurisdiction to

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1. (1931) 62 M. L. J. 399.

decide it and no jurisdiction to decide such a point can be conferred upon him by calling the dispute a dispute about boundary which it is not except by a play upon words.

I do not understand how the District Judge's decree for 3 years' rent against the respondent can in any event be supported. It is held that the ryots are not bound by the Survey Officer's order and that they have occupancy rights. The rents paid by them to the Zamindar were paid under engagements between him and his ryots. The plaintiff had no connection with these engagements which are several decades old.

The case is not one in which a trespasser has taken possession of rents due to plaintiff and collected rents from the plaintiff's tenants, and I do not see how, if the plaintiff is not entitled to possession as against the ryots, he can claim the rents paid by them to the Zamindar under engagements to which he was not a party. According to the decision in *Azhagaperumal Pillai* v. *Rasa Pillai*[1] the Zamindar's possession of the property through his tenants which began in 1873 is not affected by the Survey Officer's decision and even if the Zamindar is not in a position to question that decision assuming it related to any boundary, the plaintiff has got no right thereby to claim either possession of the property from the tenants or the rents from the Zamindar. In fact the survey decision does not mention or necessarily mean anything about the tenants or rents paid by them.

On the last point based on the Hereditary Village Offices Act, I agree with my learned brother that the suit is not barred by S. 13 or S. 21 thereof.

In the result I would dismiss the appeal with costs.

By Court.—As we are not agreed, the appeal will have to be dealt with under cl. 36 of the Letters Patent. The questions on which we differ are these:—

A. Whether there was a boundary dispute within the meaning of the Survey and Boundaries Act?

B. Whether the plaintiff is entitled to recover from the 1st defendant the *melwaram* collected by him from the other defendants for the three years preceding the suit and to the

1. (1931) 62 M. L. J. 399.

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declaration granted to him in cl. (1) of the decree of the Trial Court.

This appeal again coming on for final hearing in pursuance of the order of reference contained in the above judgment (12th and 14th April, 1932) the Court delivered the following

Wallace J.

JUDGMENT. *Wallace, J.*—This appeal has been referred to me because of a difference of opinion between the learned Judges of the Bench who heard it. The suit is one of ejectment, the plaintiff claiming to be the Government mirasi karnam of Laveru Village within the ambit of Vizianagram estate. This appeal is concerned with his plaint prayer to eject the defendants from a land Survey No. 339 on the ground that he is the mirasi Inamdar. The 1st defendant is the Zamindar and claims the *melwaram* right over the land, the other defendants claim to be the kudivaram tenants thereof.

The village was surveyed by Government in 1904 in the course of the survey of the Vizianagram estate under Act IV of 1897 and the suit land was then demarcated by the Survey Officer as mirasi Inam. Against this decision the 1st defendant's representative presented under S. 12 an appeal that the land should have been classed as *jeroyati*. That appeal was thrown out. The estate did not file any suit under S. 13 to have that decision set aside. Under that section of the Act the decision therefore became conclusive between the parties to the dispute as regards all matters in dispute. The main point contested throughout in this case has been whether the decision of the Survey Officer precludes the defendants from resisting the plaintiff's claim. It was decided by the Trial Court and that decision has not been since contested that the order of the Survey Officer does not bind the tenant defendants 2 to 12 as they were not parties to the appeal before the Survey Officer. As regards the 1st defendant, the Zamindar, both the Lower Courts held that he was precluded by the decision of the Survey Officer from resisting the plaintiff's claim and they therefore gave a decree that the plaintiff was entitled to the *melwaram* right over Survey No. 339. In second appeal Mr. Justice Spencer held that the Survey Officer's decision was without jurisdiction and therefore void, and on the ground that the plaintiff had not independently established his title he dismissed the plaintiff's suit. At the Letters Patent Appeal the learned

Judges differed on this main point and it is the chief question which I have to decide.

One would imagine that as it is the point on which the case really turned all available records in the survey proceeding would have been produced and exhibited. So far from that being so, the original proceedings of the Survey Officer are not filed nor is the entry in the Survey Register. We have only the decision on appeal, Exhibit G, the grounds of that decision, Exhibit XXIII and the appeal petition of the Zamindar, Exhibit XXIII-A, and these are by no means consistent. For example, Exhibit XXIII-A does not show that Government was a party to the enquiry, while Exhibit XXIII says that Government was a party. Again Exhibit XXIII-A says that the original decision was that the land was "subsequent," that is, post-settlement service Inam, while Exhibit XXIII says the original decision was that it was a *mirasi* Inam by which the Survey Officer on appeal, as he states clearly in his grounds, means Government service Inam, that is, pre-settlement Inam. It seems to be now admitted by the plaintiff that the Inam was really post-settlement but that error of fact on the part of the Survey Officer cannot affect the validity of his decision if he had jurisdiction to pass it.

The 1st defendant claims that the order is without jurisdiction because there was no " boundary dispute " within the meaning of the Act. One would expect that, if there was at the time of the survey inquiry any substance in this contention, it would have been put in the forefront of the 1st defendant's appeal, Exhibit XXIII-A, but there is no suggestion of it there. The contention is advanced on two grounds: first, that the dispute was really whether the land was *jeroyati* or *darmilla* Inam, that is, there was no decision that it did not form part of the estate, and secondly, even if the dispute was whether it was *Jeroyati* or pre-settlement Inam, still that is not a dispute about a boundary and therefore there is no boundary dispute. The first contention is based entirely on the wording of Exhibit XXIII-A which, as I have said, is inconsistent with the statements in Exhibit XXIII. I see no reason why, if I am to make speculations, I should speculate that Exhibit XXIII-A is right and Exhibit XXIII wrong. The 1st defendant could have made the matter quite clear by producing the original registry entry, but though it is now 15 years since the plaint was filed he has not so far

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done so. I must presume that the official act of the Survey Officer was regularly performed and with jurisdiction, that is, that the dispute was whether the land was to be demarcated within or outside of the estate, i.e., *Zamin Jeroyati* or Government service Inam. As to the second contention I find it a little difficult to follow. I understand the argument to be that there cannot be a boundary dispute unless there is a dispute between two estates or between Government and an estate regarding the physical boundary of some piece of land contiguous to both, that is, a dispute as to when, where and how the boundary between both shall run, but that if the dispute involves on one side or the other the whole of the contestant's property there cannot be any boundary dispute, because the boundary of the disputed portion is not itself in dispute. I can see no principle in such a contention. What the Survey Officer had to decide and had jurisdiction to decide was how the boundary of the Vizianagram estate was to run, whether it should exclude or include the suit Inam, and his decision was that the Inam being Government property must be excluded from the estate, demarcated out of the estate. It does not seem to me that such a dispute cannot properly be called a boundary dispute or that it is not one of the kind of disputes with which the Act was enacted to deal. Obviously the boundary of the estate cannot be properly demarcated unless controversies of this kind are settled.

If we examine the important rulings of this High Court under this Survey Act and its predecessor, we find that this is just the sort of case that has arisen and has been held to come under the Act. In the Full Bench case in *Kamaraju* v. *The Secretary of State for India*[1] a Survey Officer had demarcated out of the Bodinaikanoor estate a tract of land which Government claimed to be reserved forest. There could be here no suggestion that the tract of land constituted the whole of the Bodinaikanoor estate or the whole of the Government land. Nor was there any suggestion that there was any dispute as to the physical boundaries of the tract itself. The question was merely whether the tract was to be demarcated within the estate or outside the estate as Government land. The Full Bench held that this was a boundary dispute under the

1. (1888) I. L. R. 11 Mad. 309 (F. B.).

previous Act, XXVIII of 1860, and that the decision was *res judicata*, and the Zamindar was estopped from claiming the tract as part of his estate. The ruling in *Muthammal* v. *The Secretary of State for India*[1] is a decision of three Judges in a Letters Patent Appeal in a similar case also under Act XXVIII of 1860. The dispute there was whether a perfectly definite tract of land was part of a *mitta* or Government reserved forest. The finding was that the Survey Officer's decision that the land did not form the part of the *mitta* is *res judicata*. In the Full Bench case in *Muthirulandi Poosari* v. *Sethuram Aiyar*[2] it does not seem to have been even argued before the Full Bench that the dispute before the Survey Officer as to the possession of a perfectly definite piece of land, a lane, was not a boundary dispute within the meaning of Act IV of 1897. The only attack the 1st defendant is able to make on these decisions is that the first two were passed under the prior Act, XXVIII of 1860, and that the learned Judges made a wrong use of the words '*res judicata*'. As to the first point S. 25 of the Act of 1860 under which the decisions were passed lays down practically the same procedure and the same principles, stated in fact in much less emphatic terms, as Ss. 11 to 13 of the later Act. The scope of the inquiry under Act XXVIII of 1860 has been clearly stated in a Bench decision of this Court, *Kirukan* v. *Alagappa Chetty*[3]. As to the second point it is argued that the Privy Council in a passage in *Radhakrishna Ayyar* v. *Sundaraswamier*[4], which had nothing to do with a controversy like the present, pointed out the legal distinction between *res judicata* and statutory prohibition. I cannot see how that decision can be of any assistance to the 1st defendant here; whether one calls the decision of the Survey Officer *res judicata* or not the 1st defendant is, by force of S. 13 of the Act, estopped from agitating anew the right which he there claimed and lost since it is conclusive against him because he did not file a suit within the time granted in order to have his right restored.

It is next contended that even taking it that the Survey Officer's decision is about a boundary dispute under the Act, it cannot preclude the 1st defendant from now contending that

1. (1914) I. L. R. 39 Mad. 1202: 27 M. L. J. 529 (F. B.).
2. (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F. B.).
3. (1920) 13 L. W. 172.
4. (1922) L. R. 49 I. A. 211: I. L. R. 45 Mad. 475: 43 M. L. J. 323 (P. C.).

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the Inam is not Government service Inam, because the Survey Officer had no jurisdiction to decide questions of title. That is, if I understand the argument, while it is open to the Survey Officer to decide that the Inam was outside the estate he had no jurisdiction to decide that it was Government service Inam. This contention also I do not follow. A Survey Officer obviously has jurisdiction to decide anything which it was necessary to decide in order to come to his conclusion, and he obviously cannot avoid deciding question of title in such cases. If parties *A* and *B* are disputing whether a particular piece of land is part of the property of *A* or *B* and the Survey Officer decides that it is the property of *A*, he is deciding that it is not the property of *B*. If that is not his function, the Act would seem to be useless; and if *B's* civil rights were not interfered with by the Survey Officer's decision it would not have been necessary to declare that *B* is entitled to establish his right in a Civil Court within one year. The Full Bench decisions already quoted are clear authority for the proposition that such decisions of a Survey Officer in a boundary dispute are not limited to the mere abstract question of what are the physical boundaries in dispute but are decisions on matters of title and possession. *Kamaraju* v. *The Secretary of State for India*[1] and *Muthammal* v. *The Secretary of State for India*[2] lay down that his decision is a decision on title and conclusive. These decisions also implicitly and *Muthirulandi Poosari* v. *Sethuram Aiyar*[3] explicitly lay down that his decision on questions of possession also is conclusive. In all these cases it was held that the decision of a Survey Officer on all these points is *res judicata* and binding on the parties to the boundary dispute. *Kirukan* v. *Alagappa Chetty*[4] is a Bench case directly on the finality of the Survey Officer's decision on a question of title, and *Kuppuswami Aiyar* v. *Venkataswami*[5] is a Bench decision directly holding the finality of the Survey Officer's decision on a question of possession, even when the decision was in fact wrong. The case of *Muthirulandi Poosari* v. *Sethuram Aiyar*[3] is particularl y instructive on this point because it held that the decision of a Survey Officer is a decision that the

1. (1888) I. L. R. 11 Mad. 309 (F. B.).
2. (1914) I. L. R. 39 Mad. 1202: 27 M. L. J. 529 (F. B.).
3. (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F. B.).
4. (1920) 13 L. W. 172.
5. (1922) 16 L. W. 99.

successful party is in possession even though the unsuccessful party was really in possession, and that the decision estops the unsuccessful party from urging later on that he was in possession. The 1st defendant seeks to turn the edge of this decision by referring me to a Bench ruling of this Court in *Ashagaperumal Pillai* v. *Rasa Pillai*[1] where the learned Judges say that they do not interpret the Full Bench decision as meaning that the Survey Officer's decision stops the running of possession of a party really in possession. The learned Judges of the Bench give no reasons for this opinion except to refer to an opinion of Ramesam, J., in *Kuppuswami Aiyar* v. *Venkataswami*[2] which, if I may say so with the greatest respect, cannot quote the learned Judge correctly, because if he really meant that the possession of the defendants in that case was not interrupted by the decision of the Survey Officer, then he would have upheld the defendants' title by adverse possession. But on the contrary he agreed with the other learned Judge of the Bench in decreeing for the plaintiffs on the ground that the decision of the Survey Officer that the plaintiffs were in possession is binding on the defendants. I therefore agree with Waller, J., in his referring judgment in this case that the plain meaning of the Full Bench ruling is that the decision of the Survey Officer is conclusive on the question of possession. There is no real hardship done and there is nothing extraordinary in the decision of an executive officer having such an effect since the civil rights of the parties are not injured provided they sue, as in the Act they are directed to sue, within one year of the decision.

The 1st defendant relies on a ruling in *Chinna Venkatrayudu* v. *Ramamurti*[3] that the correctness of an order under S. 12 of the Act IV of 1897 may be disputed afterwards in a Court of law. That case is really against him. It clearly lays down that if the order was passed under S. 13 its correctness cannot be subsequently disputed. The order in the present case is under S. 13. I am quite clear therefore that the decision of the Survey Officer, expressed in Exs. G and XXIII, is binding on the 1st defendant and he is not at liberty now and here to canvass its correctness.

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1. (1931) 62 M. L. J. 399. 2. (1922) 16 L. W. 99.
3. (1920) I. L. R. 44 Mad. 340 : 40 M. L. J. 149.

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The Full Bench decision in *Muthirulandi Poosari* v. *Sethuram Aiyar*[1] settles his further contention based on adverse possession. The 1st defendant's possession was interrupted in 1905 on 31st July, 1905, by the decision of the Survey Officer. The suit was within 12 years of that date and therefore the 1st defendant has not prescribed by 12 years' continuous adverse possession before suit.

It may be mentioned incidentally that even if there were any substance in the 1st defendant's contention that the original dispute was as to whether the land was *jeroyati* or *darmilla* Inam, the case in *Chinna Venkatrayudu* v. *Ramamurti*[2] is authority for the proposition that even so it would be a boundary dispute within the Act and the decision is therefore final. This also receives support from the judgment of Sadasiva Aiyar, J., in *Kirukan* v. *Alagappa Chetty*[3].

I therefore hold that the decision of the Survey Officer is conclusive that the Inam is not part of the 1st defendant's estate, but is Government service Inam. It is the fault of the 1st defendant or rather the fault of his predecessor that he cannot now contest these matters. That decision then puts the plaintiff in the position of a Government service Inamdar and from that position he cannot now be dislodged. Whether or not the attainment of that position in 1905 gave him both the *melwaram* and *kudiwaram* rights need not now be discussed since the plaintiff is not here contending that he possesses the *kudiwaram* right. That would be a difficult position to maintain against the sitting tenants, defendants 2 to 12, who were not parties to the proceedings which declared him to be the *mirasi* Inamdar. He was therefore rightly held by the Lower Courts not to be entitled to eject the tenants but entitled only to a decree declaring this *melwaram* right against the 1st defendant. The 1st defendant contends that such a decree was for a relief for which the plaintiff had never asked. But that is fundamentally to misunderstand the legal position. The plaintiff sued for possession and the *melwaram* right is a possessory right. It is not accurate to describe it as a mere declaratory right. It is a species of possession, in fact the only kind of possession which, for example, a landlord and estate proprietor under the Madras Estates Land Act can have, and no one has yet dreamt

1. (1919) I. L. R. 42 Mad. 425: 36 M. L. J. 356 (F. B.).
2. (1920) I.L.R. 44 Mad. 340: 40 M.L.J. 149. 3. (1920) 13 L. W. 172.

of contending that such a landlord has no possessory right. The plaintiff therefore has been given such possession as he could be given consistent with the finding in the case. He is not entitled to possession against the tenants, he is entitled to have his possessory right to the *melwaram* declared against one who has been wrongfully in possession of it. For the same reason the decree for recovery of three years' *melwaram* from the 1st defendant is correct since the 1st defendant has been trespassing on the plaintiff's rights as *melwaramdar* and wrongfully appropriating what belongs to the plaintiff.

The 1st defendant has founded an argument on this point on a statement of the Trial Court at page 8 of the printed papers "The relationship of landlord and tenant has never been established between the plaintiffs and defendants 2 to 12," and argues that therefore the 1st defendant could not trespass on a relationship which did not exist. The context in the judgment shows clearly that what the Subordinate Judge meant was that since the Survey Officer's decision did not bind defendants 2 to 12 and since defendants 2 to 12 were not shown to be the tenants of the plaintiff, the plaintiff could not get a decree to eject them. By "tenants" he obviously meant ordinary tenants. But where the plaintiff is found to have been the *melwaramdar* since 1905, as the Trial Court itself held, it is not open to *kudiwaram* tenants to say that he is not their landlord, and the Trial Court in view of its decision in the case could not possibly have meant to say so.

I therefore agree with Waller, J., that the decree of the District Court is correct and the decree of that Court must therefore be restored. The plaintiff will have his costs against the 1st defendant throughout in all Courts.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

N. R. M. M. M. Muthiah Chettiar .. *Appellant** (*2nd respondent*)

v.

The Official Receiver of Tinnevelly District and another .. *Respondents* (*Petitioner and 1st respondent*).

Muthiah Chettiar *v.* The Official Receiver of Tinnevelly District.

Provincial Insolvency Act (V of 1920), Ss. 9, 53 and 54—Transfer made within three months—Computation of time—Date of registration or execution of document material.

One of the conditions required to bring a case within the operation of S. 54 of the Provincial Insolvency Act is that the transfer complained of should have been made within three months before the date of the presentation of the insolvency petition. The period of three months so specified should be calculated not from the date of the execution of the document of transfer but from the date of its registration in cases where a registered deed is necessary to effect a valid transfer of property.

Appeal against the order of the District Court of Tinnevelly, dated the 26th day of April, 1927 and made in C. M. A. No. 47 of 1926 preferred against the order of the Court of the Subordinate Judge of Tuticorin, dated the 16th day of September, 1926 and made in O. P. No. 29 of 1925 (O. P. No. 42 of 1925 on the file of the District Court of Tinnevelly).

K. V. Krishnaswami Aiyar for appellant.

R. Krishnaswami Aiyangar for respondents.

The Court delivered the following

JUDGMENT.—The 2nd respondent in O. P. No. 29 of 1925 is the appellant. This Civil Miscellaneous Second Appeal arises out of an application filed by the Official Receiver for a declaration that a mortgage deed, dated 9th March, 1922, executed by the 1st respondent, the insolvent, in I. P. No. 26 of 1922, in favour of the appellant, one of his creditors, is void as against him both under Ss. 53 and 54 of the Provincial Insolvency Act. The application was dismissed by the learned Subordinate Judge of Tuticorin. His decision was set aside in appeal by the learned District Judge of Tinnevelly. He held that the transaction in question is bad under both Ss. 53 and 54 of the Act. The present second appeal is against that decision of the learned District Judge.

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*A. A. A. O. No. 217 of 1927 and C. M. P. No. 4485 of 1932. 28th September, 1932.

Muthiah Chettiar v. The Official Receiver of Tinnevelly District.

A preliminary objection is taken by the respondent, the Official Receiver, that no second appeal lies in this case. This objection is accepted by the learned counsel for the appellant; but he argues that the decision of the case involves a decision on a question of jurisdiction and that therefore the case should be dealt with under S. 115, Civil Procedure Code. His argument is twofold: (1) the alienation in question being in favour of a creditor, the petition to annul it does not fall under S. 53 of the Provincial Insolvency Act but falls only under S. 54; and (2) when treated as a petition under the latter section it will be found that the Court has no jurisdiction to annul it inasmuch as the alienation complained of was made more than three months before the date of presentation of the insolvency petition; or, in other words, that the petition for insolvency was presented after the expiry of three months after the date of the transaction. In support of his first argument the only decision relied on by Mr. Krishnaswami Aiyar is *Appathorai Odayar* v. *The Official Receiver, Tanjore*[1], but that decision does not support him; in fact the question now raised was not raised in that case at all. Two other decisions were also referred to by him, *Mandavilli Ramanna* v. *Official Receiver, Godavari*[2] and *Jawanmull* v. *Sripathi Rao*[3] but these have hardly any bearing on the question.

But I shall assume for the purpose of this case that the above argument is good and deal with the next argument, namely, whether the Court has jurisdiction to annul the alienation under S. 54. S. 54 runs as follows:—

"(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court."

One of the conditions required to bring a case within the operation of the section is that the transfer complained of should have been made within three months before the date of the presentation of the insolvency petition. Mr. Krishnaswami Aiyar contends that in this case the insolvency petition was presented after the expiry of three months from the date of the mortgage, Ex. I, and therefore the Court had no jurisdic-

1. (1926) 99 I. C. 683. 2. (1926) 101 I. C. 153 (2).
3. (1926) 101 I. C. 568 (1).

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tion to deal with the application under the section. To appreciate the arguments on this point it is necessary to state the following facts. The mortgage was executed on 9th March, 1922. The Court closed for the summer recess on or about 9th May, 1922. The document was registered on 9th June, 1922. The Court opened after the summer recess on 10th July, 1922. The petition was presented on 10th July, 1922.

It is argued that since the petition was presented on 10th July, 1922, admittedly after the expiry of three months from the date of the transaction, 9th March, 1922, the case does not fall within S. 54 of the Act. To this argument the learned counsel for the respondent offers three answers: (1) that the period of three months for presenting the petition should be calculated from 9th June, 1922, the date when the document was registered as it was only then that a complete transfer of property was made under the document; (2) that even if the date is to be calculated from 9th March, 1922, since the Court was closed at the time when three months expired from that date, the Official Receiver is entitled to file the petition on the re-opening of the Court; (3) the third answer has reference to S. 9 (*c*) of the Provincial Insolvency Act. In this case this alienation, that is the mortgage transaction in question, was itself the act of insolvency on which the insolvency petition was admitted. The Court acting on that petition has adjudicated the 1st respondent an insolvent. Under S. 9 of the Act the insolvency petition if by a creditor—and the petition in this case is by a creditor—must be filed within three months of the act of insolvency. One of the conditions required for the avoidance of transfers under S. 54 is that such person (the transferor) should be "adjudged insolvent on a petition presented within three months after the date thereof" (that is, the date of the transfer). Having regard to the language used in S. 9 and in S. 54 it is argued that if the insolvency petition in this case has been filed properly within three months after the date of the transfer which is the act of insolvency, then for the purposes of S. 54 it may well be held that the transferor, that is the insolvent, is adjudged insolvent on a petition presented within three months after the date of the transfer; or in other words that the petition of insolvency was presented within three months after the transfer and that therefore the condition under S. 54 which is in

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question has been strictly complied with. All these three alternative arguments of the respondent deserve serious consideration, but I propose to deal only with the first point raised by him, that is, should the period of three months be calculated from the date of the execution of the document or from the date of its registration? If the period may be calculated from the date of registration, then in this case the document having been registered on 9th June, 1922 and the petition of insolvency having been presented on 10th July, 1922, the petition was clearly presented within three months after the date of the transfer, and the requirement referred to in S. 54 of the Act has been complied with.

The alienation in this case is a mortgage. The consideration for it is more than Rs. 100. That being so, the mere execution of the document does not make it a valid transfer of property. Under S. 59 of the Transfer of Property Act, "Where the principal money secured is Rs. 100 or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested at least by two witnesses." Registration of the document is therefore essential to make it a valid transfer, and when registered "the document shall operate from the time it would have commenced to operate if no registration thereof had been required or made . . .," that is, in this case from the date when the document was executed, namely, 9th March, 1922. In a case like the present, up to the date of registration there can be no valid transfer or mortgage of land within the meaning of S. 59 of the Transfer of Property Act. If the time was to run from the date of execution of the document the object of S. 54 could easily be frustrated. A mortgage or sale of immovable property may be registered up to four months after its execution. As pointed out by the learned Judge, a dishonest insolvent has only therefore to date such fraudulent transfers with a date more than three months prior to the filing of the petition and then they cannot be avoided under S. 54.

For the above reasons I would hold that even if the petition for the annulment is to be treated solely as one falling under S. 54, the Court had jurisdiction to deal with it as the conditions required under that section have been fully complied with. In this view the other points raised by the respondent need not be discussed.

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If the petition can be dealt with under S. 53 of the Act also, as it has been dealt with by the Lower Courts and as I think it can well be, then having regard to the findings it is clear that no question of jurisdiction arises. It therefore follows that in any event this Civil Miscellaneous Second Appeal should be dismissed. The 1st respondent will get his costs from the appellant.

C. M. P. No. 4485 *of* 1928.—No order is necessary.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Annadana Jadaya Goundar .. *Appellant** (*Petitioner—1st Respondent.*)

v.

Konammal and another .. *Respondents* (*Respondent—1st Plaintiff and 4th Surety*).

Annadana Jadaya Goundar v. Konammal.

Principal and surety—Surety bond — Construction — Compromise arrangement between creditor and principal debtor—Liability of surety—Covenant not to sue principal debtor—Whether extinguishes liability of surety—Arrangement providing for extended time for payment by principal—Effect—Contract Act (IX of 1872), S. 135.

K obtained a decree against one *J* for possession of a jaghir and an appeal was preferred by the latter to the High Court. *K* was allowed to execute the decree pending the appeal on her furnishing security and *A* and four others executed a surety bond by which they undertook that *K* would restore the property taken delivery of in execution and act according to the decree of the Appellate Court and that in default the amount that she was liable to pay might be realised from the property given as security. In the appeal *J* succeeded and got back from *K* the jaghir by way of restitution. He then applied for payment of mesne profits and subsequently entered into a private arrangement with *K* by which the profits were fixed at a particular figure and it was agreed that he should draw out from Court a certain amount remaining to the credit of *K* and that the balance should be paid by the latter within a certain time. It was further agreed that if *K* defaulted *J* might take out execution proceedings against the immovable properties given as security. The Court embodied the compromise by means of an order. Later on *K* applied to recover from *A*, one of the sureties, the unpaid balance of the amount of mesne profits agreed upon.

Held, that as the compromise was not in terms excluded from the surety bond the surety was liable, even though the stipulation sought to be enforced against him was entered into without his knowledge.

Appuni Nair v. *Isack Mackadan*, (1919) I.L.R. 43 Mad. 272: 37 M.L.J. 435, *Haji Ahmed* v. *Maruti Ramji*, (1930) I. L. R. 55 Bom. 97 and *Jia Bai* v. *Joharmull Bothra*, (1932) 36 C. W. N. 749, relied on.

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*C. M. Appeal No. 294 of 1930. 12th October, 1932.

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Held further, that surety's liability was not extinguished by reason of the principal debtor being discharged inasmuch as the deed releasing the principal itself contained a reservation of remedies against the surety and operated merely as a covenant not to sue.

Rowlatt on *Principal and Surety*, 2nd Ed., p. 260, White and Tudor's *Leading Cases in Equity*, Vol. II, p. 544, *Murugappa Mudaliar* v. *Munusami Mudali*, (1919) 38 M. L. J. 131 and *Sami Aiyar* v. *Ramaswami Chettiar*, (1922) 44 M. L. J. 171, referred to.

Held, however, that the surety was discharged because the compromise arrangement provided for postponed payment of the amount due by the principal debtor.

White and Tudor's *Leading Cases in Equity*, Vol. II, p. 539, *Rouse* v. *Bradford Banking Co.*, (1894) 2 Ch. 32 at 75, *Appul Gafur* v. *Mannalal*, A. I. R. 1927 Cal. 239 and *Kunj Lal* v. *Batuk Prasad*, (1929) 120 I. C. 552 (1), referred to.

Appeal against the order of the District Court of South Arcot, dated the 27th day of January, 1930 and made in C. M. P. No. 288 of 1929 in Mis. Petition Register No. 736 of 1924 in O. S. No. 13 of 1916.

K. V. Sesha Aiyangar for appellant.

C. S. Venkatachariar for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—This is an appeal against the order refusing to make the surety, the respondent (Anganna Reddi) liable in execution. The facts may be briefly stated. A lady by name Konammal obtained a decree against one Annadana Jadaya Goundar for possession of a jaghir, and an appeal was preferred by the latter to the High Court. Konammal was allowed to execute the decree pending the appeal on her furnishing security. A security bond was thereupon executed by four sureties, including the respondent Anganna Reddi. The material portion of that bond runs thus:

"We hereby undertake that the 1st plaintiff (Konammal) will restore the jaghir which she had taken delivery of in execution, that she will act according to the decree of the Appellate Court, that she will pay whatever amount she is liable to pay in accordance with the appellate decree in connection with the said jaghir, that if she commits default in so paying, the amount that she is liable to pay may be realised from the properties hereby given as security."

In the appeal Goundar succeeded and got back from Konammal the jaghir in question by way of restitution. Then he applied also by way of restitution for payment of mesne profits. But without any inquiry by the Court, Goundar and Konammal entered into a private arrangement as to the claim to the mesne profits. To this proceeding the surety Anganna Reddi was not a party. The amount claimed in respect of mesne profits was Rs. 33,000, but by the arrangement

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the profits were fixed at Rs. 20,000 and it was agreed that Goundar should receive towards this amount Rs. 9,000 odd standing to the credit of Konammal in Court and that the balance of Rs. 10,000 odd should be paid by Konammal within a period of two months. In default (then follow the important words) "Goundar should take execution proceedings against the immovable properties which were offered as security by the sureties". The agreement then goes on to say, "All reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement". An order was made by the Court on the 10th September, 1926, embodying this compromise. It is alleged by Goundar that towards the amount due under the order, namely, Rs. 10,000 odd, one of the sureties subsequently paid Rs. 5,000, and he now claims in execution the balance of Rs. 5,000 odd against Anganna Reddi, the respondent. It is not disputed, though the instrument is not happily worded in this respect, that the claim to mesne profits by way of restitution is covered by its terms.

Anganna Reddi contends that the claim made by Goundar in respect of mesne profits was an extravagant one and that the compromise and the order based thereon were collusive and fraudulent. Whether it is open to Anganna Reddi to raise this plea in these proceedings is a question which does not arise in the view I have taken.

Three points have been urged by Anganna Reddi, the surety, who contends that his liability under the surety bond has become extinguished. First, he says that, the order made not being after contest but by consent, he is not bound by it. There is no force in this contention. The true test is, whether a consent order is excluded by, or is outside the scope of, the surety bond. As held in *Appunni Nair* v. *Isack Mackadan*[1] in the absence of any special stipulation in that behalf, there is no ground for limiting the liability only to a decree passed after contest. The same case points out that, if there has been collusion between the plaintiff and defendant in obtaining the decree, the surety is not without remedy. The same view was taken in *Haji Ahmed* v. *Maruti Ramji*[2]. The learned Judges observe, whether a compromise as such is or is not excluded by

1. (1919) I. L. R. 43 Mad. 272: 37 M. L. J. 435.
2. (1930) I. L. R. 55 Bom. 97.

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the terms of a surety bond is a question of fact in each case. As a compromise was not in terms excluded from the surety bond, they held that the surety was bound by the compromise, although it had been entered into without his knowledge. In this Bombay case, *Appunni Nair* v. *Isack Mackadan*[1] was approved and followed. This view receives support also from *Jia Bai* v. *Joharmull Bothra*[2]. In that case Rankin, C. J., considers at length *Tatum* v. *Evans*[3], a decision cited for the contrary position, and points out how it is clearly distinguishable. The agreement there was the result of an elaborate arrangement embracing a great many different matters, and it would be impossible to hold that the surety, when he entered into the bond, bound himself in the expectation that such an arrangement would be made. In other words, the question in each case is, would the terms of the bond reasonably warrant that the arrangement come to by consent was or was not within the contemplation of the parties? Some cases where a different view has been taken have been cited to us, and I do not think it necessary to refer to them. This contention of Mr. Venkatachari, the surety's counsel, must be overruled.

Secondly, it is argued for the surety that under the consent order the principal debtor having been discharged, his own obligation has become extinguished. Under the order quoted above, on Konammal failing to pay the balance of Rs. 10,000 odd in two months, the creditor's remedy is confined to proceeding against the surety: in other words, the creditor has abandoned his remedy against the principal debtor. It is on the strength of this clause that the contention has been put forward that the surety's liability has become extinguished. But Mr. Sesha Aiyangar, the learned counsel for Goundar, urges that there is a well-recognised exception to the rule that the surety is released when the principal debtor is discharged and that on the facts of this case it is the exception and not the rule that applies. This argument is clearly well founded. The rule of law that the discharge of the principal debtor necessarily carries with it the release of the surety is founded on this principle: it would be a fraud on the principal debtor, for the creditor to release him from liability, if the latter were then able to proceed against the surety, who in his turn might sue the

1. (1919) I. L. R. 43 Mad. 272: 37 M. L. J. 435.
2. (1932) 36 C. W. N. 749.
3. (1885) 54 L. T. 336.

Annadana Jadaya Goundar v. Konamma. — Venkatasubba Rao, J.

principal debtor and thus render the alleged release nugatory. (15 Hals., S. 1056.) See also *Sami Aiyar* v. *Ramaswami Chettiar*[1] at the bottom of page 177. But if the deed releasing the principal debtor itself contains a reservation of remedies against the surety, the release is reduced to a mere covenant not to sue. (*See* 15 Hals. same section.) The rule as well as the exception are very clearly stated in the following passage in Rowlatt on *Principal and Surety*, Second Edition, p. 260:

> " The doctrine under which a surety is discharged by an arrangement on the part of the creditor either not to sue, or to give time to the principal debtor, resting as it does upon the principle that otherwise a fraud would be committed upon the principal, does not apply if it is made a condition of the agreement that the rights of the creditor to sue or receive the money from the surety are reserved; for in that case the principal takes the indulgence upon the footing that he must continue exposed to a claim at the instance of the surety, and the arrangement becomes one, the observance of which does not involve the suspension of any right of the surety. The surety is therefore not discharged."

The principle is this: If a creditor agrees to discharge the principal debtor, it would be a breach of the agreement so entered into, for the creditor to pursue his remedy against the surety, for the latter would in his turn enforce his remedy against the principal debtor and thus the creditor's agreement to discharge would be rendered inoperative; but if the very agreement to discharge the principal debtor contains a reservation of rights against the surety, the agreement cannot operate as an absolute release, for the obvious reason that the principal debtor has notice that the creditor's remedies against the surety are preserved and that the latter's right of recourse against him is not extinguished. The following passage from White and Tudor expresses this idea very clearly and concisely:—

> " A release, with a reservation of rights against the sureties, operates as a covenant not to sue between the creditor and the debtor and does not release the sureties. And language importing an absolute release may be construed as a covenant not to sue the principal debtor, when that intention appears, leaving the debtor open to any claim of relief at the instance of his sureties." White and Tudor's *Leading Cases in Equity*, Vol. II, p. 544.

See also *Murugappa Mudaliar* v. *Munusami Mudali*[2] and the notes to S. 135 of the Indian Contract Act in Pollock and Mulla's Commentaries. In this case there is such a contract for reserve against the surety, and it is the exception and not the rule that applies. I cannot therefore accept Mr. Venkata-

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1. (1923) 44 M. L. J. 171. 2. (1919) 38 M. L. J. 131 at 144.

chari's contention that the surety's liability became extinguished on this ground.

But the third contention of Mr. Venkatachari, the one accepted by the Lower Court, must prevail. By the terms of the order passed on the arrangement come to by consent, Konammal was given two months' time for the payment of the balance of the amount declared to be due. For the surety it is contended that this giving of time has had the effect of discharging him. Can this compromise be regarded as having been within the contemplation of the surety when he executed the surety bond? He agreed under it to pay whatever amount might be found due; that is to say, the payment became due on the date it was in due course ascertained. It was held in *Mahomedalli Ibrahimji* v. *Laxmibai*[1] that a compromise providing for the payment of the decretal amount by instalments had the effect of discharging the surety, the test laid down being, is the compromise consistent with the obligations which the surety had undertaken to discharge?

Kemp, A. C. J., observes:

"His (surety's) rights against the debtor are prejudiced by this compromise, and, I think, it can fairly be said that such a compromise was not one which was contemplated by him when he entered into the suretyship."

There are observations in the judgment of Kemp, A. C. J., to the effect that the very fact that the decree was one passed on consent had the effect of releasing the surety. I have already said that I take a different view on this point but I agree that if an arrangement provides for postponed payment or for the amount being paid by instalments, the surety is discharged from his obligation. *Appul Gafur* v. *Mannalal*[2] and *Kunj Lal* v. *Batuk Prasad*[3] support this view. The observations of Rankin, C. J., in *Jia Bai* v. *Joharmull Bothra*[4], already cited, are *obiter*. In an old English case, *Bowsfield* v. *Tower*[5], heard by four Judges, the headnote runs thus:

"If a plaintiff accepts from the principal defendant a cognovit whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement."

Gibbs, J., observes:

"I was of counsel in the cause in the Court of King's Bench in which it lately was ruled, that by giving a cognovit payable by instalments, the bail

1. (1929) I. L. R. 54 Bom. 118.
2. A. I. R. 1927 Cal. 239.
3. (1929) 120 I. C. 552 (1).
4. (1932) 36 C. W. N. 749.
5. (1812) 4 Taunton 456: 128 E. R. 405.

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Venkatasubba Rao, J.

were discharged, by analogy to the cases where a creditor, by giving time to the principal, discharges the surety."

The principle that a contract by a creditor to give time to the principal debtor discharges the surety is well recognised. The reason of the rule is this: the surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt or himself pay off the debt and when he has paid it off he is at once entitled to sue the principal debtor; and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed. (See *Rouse* v. *Bradford Banking Co.*[1] and White and Tudor's *Leading Cases in Equity*, Vol. II, page 539.)

Mr. Sesha Aiyangar argues that in this case also the rule does not apply, as there is a contract for reserve against the surety. The question is, is there any reservation of rights as contended? If the arrangement, which said that Konammal was given two months' time, had also provided that Goundar could proceed against the surety in the meantime, there would then have been a reservation and Mr. Sesha Aiyangar's contention would have been right. But the consent order, far from containing any such reservation, says in terms that only in the event of Konammal failing to pay within the two months, the surety could be proceeded against. The facts of the present case bring it within the rule as to the giving of time and not the exception relating to the reservation of rights. I must uphold therefore the third contention of the surety, and, agreeing with the Lower Court, hold that he is not liable.

In the result, the appeal fails and is dismissed with costs.

Reilly, J.

Reilly, J.—I agree that we must uphold the learned District Judge's order for the reason given by him, that by the consent order made between Plaintiff 1, Konammal, and Defendant 1 on the 10th September, 1926, time was given to Konammal to pay the balance of the Rs. 20,000 fixed for mesne profits and that therefore the surety was discharged. The learned District Judge has said that this is so under S. 135 of the Contract Act. Mr. Sesha Aiyangar is right in contending that S. 135 of the Contract Act does not apply to this case.

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1. (1894) 2 Ch. D. 75.

This is not a case to which the provisions of the Contract Act directly apply. But Ss. 133, 134 and 135 of the Contract Act and some of the following sections embody equitable principles which have long been established in England, and I have no doubt that a surety can claim the protection of those principles in such proceedings as these. So long ago as 1795 in *Rees* v. *Berrington*[1] a creditor gave time to the principal debtors, and, when they did not pay in the time so given, instituted an action against the surety: the surety preferred a bill in the Court of Chancery praying for an injunction that the action should be stayed, and Lord Loughborough, L. C., held that he was clearly entitled to such an injunction on the ground that his rights had been interfered with behind his back by granting time to the principal debtors. That principle—that the granting of time without the consent of the surety to his principal discharges the surety in such a case—has been reiterated very many times. But, as Mr. Sesha Aiyangar pointed out, there is one exception to it. If, though time is granted by the creditor to the principal debtor by agreement with him, nevertheless under that agreement the creditor's right to proceed at once against the surety is reserved, then, as pointed out by Page Wood, V.C., in *Webb* v. *Hewitt*,[2] the surety is not discharged, the reason being obviously that the creditor may proceed at once against the surety and the surety in his turn may proceed at once against the principal debtor. Mr. Sesha Aiyangar suggests that this is such a case. In the consent order made on the 10th September, 1926, it is provided that the balance of Rs.10,000 shall be paid to the petitioner, *i. e.*, Defendant 1, by Konammal within a period of two months: in default the petitioner shall take execution proceedings against the immovable property charged as security. Mr. Sesha Aiyangar urges that we should interpret that as meaning that, although Defendant 1 was not to proceed against the principal debtor, Konammal, for two months, his right to proceed against the surety at once was reserved. In my opinion it is impossible to interpret the order in that way. The order gives two months' time to Konammal and provides, not that Defendant 1 may at once proceed against the security, but that he may proceed against the security in default of payment by Konammal within those two months. It is clear,

1. (1795) 2 Ves. 540: 30 E.R. 765. 2. (1857) 3 K. & J. 438: 69 E.R. 1181.

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therefore, I think, that the right of the creditor to proceed at once against the security or the surety in spite of time being given to the principal debtor was not reserved in this case, and the exception to the rule in regard to granting time to the principal debtor does not apply here.

Mr. Sesha Aiyangar however contends that in this case there was no extension of time, there was really no giving of time at all to Konammal. It is quite true that we have not in this case a definite time fixed by contract, which was afterwards extended. But does that take this case out of the rule about the giving of time? What the sureties undertook in this case was to discharge out of the property which they gave as security and, if that was not enough, to discharge personally whatever was eventually decided to be due in connection with the decree to be made in respect of the jaghir, if Konammal failed to pay it. That must mean that they undertook to pay what she might be found liable to pay and to pay it when she was found so liable. I do not think it is possible to attach any other reasonable meaning to their undertaking. In this particular case it was found and settled by the consent order on the 10th September, 1926, that what she was liable to pay was Rs. 20,000, out of which Rs. 9,900 was to be paid from money which she had deposited in Court. But, instead of her being made liable to pay the balance at once, she was given by the consent order—that is in effect by the creditor, Defendant 1—two months' time to pay it. It is impossible, I think, to suggest seriously, when the matter is fully considered, that the sureties were not injuriously affected by that postponement, by the allowing of two months to Konammal after her liability had been finally fixed, provided that the order meant in effect, as I have no doubt it meant, that the sureties or their property could not be proceeded against for the balance during those two months and they in turn could not proceed against Konammal during those two months. It is obvious that during those two months Konammal would be at liberty to secrete any movable property or to make away with her property in other manners, if she wished to do so. And there has been an allegation in this case that she did during that time draw Rs. 4,000 from Court and put it away somewhere. That allegation has not been proved; but at any rate it illustrates the way in which the sureties' interests might be very

seriously affected by Konammal being given two months' time, as she was in this case.

There is one other point taken by Mr. Sesha Aiyangar, to which I may refer. He quoted an Irish case, *Provincial Bank* v. *Cussen*[1] as an authority to show that the rule about a surety being discharged when time is given to his principal debtor does not apply when that is done by a judicial act with the consent of the creditor. Now that, if I may say so, is not either fully or accurately the effect of that case. But I do not think it necessary to discuss that case at length because it arose in connection with Bankruptcy proceedings, where obviously very different considerations apply. And moreover the order, which was made on the 10th September, 1926, in this case, though made with the consent of the creditor, was not in my opinion a "judicial act" in the sense suggested by Mr. Sesha Aiyangar in connection with this Irish case. There was a compromise between the two parties concerned and on the face of it a perfectly lawful compromise. All that the Court had to do was to accept the compromise and make an order accordingly. There was in no sense an adjudication between the parties. There is really not much meaning in calling that a "judicial act," nor do I think it of any use to try to show that for that reason the order so made was not one to which the principles in regard to the discharge of a surety, which we have been discussing in this case, apply.

That is really sufficient for the disposal of this case, as we uphold the decision of the learned District Judge on this objection of the surety. But, as my learned brother has mentioned, another question has been argued before us at considerable length. Among the objections raised in the surety's counter-statement in the District Court was one to the effect that, as Konammal was released altogether by the consent order of the 10th September, 1926, the surety was thereby discharged. Oddly enough at first sight, the learned District Judge in enumerating the three points actually pressed before him at the hearing of the case does not mention that objection at all. It was suggested by Mr. Venkatachari for the surety that the learned Judge was mistaken in supposing that the surety did not intend to press that point in the case. Certainly the learned District Judge does not say that the point was given

1. (1886) 18 L. R. Irish 382 (C. A.).

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up; but he does not enumerate it among the points pressed before him, and he says nothing whatever about it in his judgment. It was a point for serious discussion, if the surety thought fit to press it, though, as we have found, he could succeed on a narrower point. The words of the consent order have already been quoted in part. On the face of it the order provides that Konammal should pay the balance of Rs. 10,000 within two months and that in default of her so doing Defendant 1 should take execution proceedings against the immovable property offered as security by bringing it to sale in pursuance of the charge created over it. But after that there is another sentence, which it is suggested is of considerable importance, namely, "All reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement". It is urged that, taking those three provisions together, Konammal was entirely released if she did not happen to pay within the two months, and the result of that would be that the surety must have been discharged. Now, it must be noticed that the order contains no explicit release of Konammal. If there is a release, we have to find it by implication. And on the other hand there is an explicit statement that in default of payment by Konammal Defendant 1 is to proceed in execution against the property charged as security. In the absence of any explicit release of Konammal and in the face of the definite statement that Defendant 1 is to proceed against the property given as security I cannot interpret the provision that "all reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement" as meaning that Konammal was released. On the other hand we have here something even more than a reservation of the right to proceed against the security in spite of the supposed release. Even if the language of the order was clearly in its literal meaning a release of Konammal, nevertheless, if a right to proceed against the charged property or against the surety was reserved, then the surety would not be discharged. Here we have something even more serious against the surety, namely, an explicit statement that Defendant 1 is to proceed against the charged property. As my learned brother has pointed out, even if by agreement there is an explicit release of the principal debtor by his creditor, when that is combined with a reservation of the creditor's right to proceed against the surety, that does not

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discharge the surety. The effect of such an agreement with such a reservation is that the principal debtor agrees that the liability of the surety shall continue with the corollary that the right of the surety to exact his remedy in turn from the principal debtor also continues. There are many authorities for that, such as *Kearsley* v. *Cole*[1], *Bateson* v. *Gosling*[2] and *Cragoe* v. *Jones*[3]. The principle behind both the rule regarding the granting of time to the debtor and the rule regarding the release of the debtor is the same. If by agreement between the creditor and the principal debtor without the surety's consent the surety's right of recourse against the principal debtor is destroyed or impaired or interfered with, then the surety's liability goes and the surety is discharged. But the reservation to the creditor of a right to proceed against the surety in either class of cases prevents the discharge of the surety, as with the reservation the surety's right of recourse against the principal debtor also is preserved. In this case we cannot find, when we examine the matter carefully, that Konammal was released by the consent order of the 10th September, 1926, and, even if part of the wording of the order had implied that, the provision regarding execution against the security would make the release ineffective. That very probably explains why this particular point was not urged with any persistence before the learned District Judge.

But the other point remains, that time was given to Konammal and thereby the surety was discharged.

I agree that this appeal should be dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE PAKENHAM WALSH.

The Official Receiver, West Godavari, Ellore .. *Appellant** (*Petitioner*)

v.

Sagiraju Subbayya and another .. *Respondents* (*Counter-petitioners*).

The Official Receiver, West Godavari, Ellore v. Sagiraju Subbayya.

Provincial Insolvency Act (V of 1920), Ss. 4, 53 and 54—Voidable transfer—Application by Official Receiver to set aside—Jurisdiction of Insolvency Court—Scope of Ss. 53 and 54.

*A. A. A. O. No. 126 of 1929. 3rd January, 1933.

1. (1846) 16 M. & W. 128: 153 E. R. 1128. 2. (1871) L. R. 7 C. P. 9.
3. (1873) L. R. 8 Exch. 81.

The Official Receiver, West Godavari, Ellore *v.* Sagiraju Subbayya.

The Insolvency Court has jurisdiction to entertain an application by the Official Receiver to set aside a voidable deed of transfer. Its jurisdiction is not confined to deeds which are void.

Sections 53 and 54 of the Provincial Insolvency Act contain only rules of evidence.

Dronadula Sriramulu v. *Ponakavira Reddi*, (1923) 45 M. L. J. 105, relied on.

Anwar Khan v. *Muhammad Khan*, (1929) I. L. R. 51 All. 550 (F. B.), referred to.

Appeal against the appellate order of the Court of the Subordinate Judge (Principal) of Ellore, dated the 24th September, 1928, and made in Appeal No. 189 of 1928, preferred against the order of the Court of the District Munsif of Bhimavaram, dated the 10th March, 1928 and made in C. M. P. No. 2907 of 1927 in I. P. No. 145 of 1925 on the file of the Official Receiver, Kistna (I. P. No. 16 of 1925 on the file of the Court of the District Munsif of Bhimavaram).

V. Suryanarayana for appellant.

Ch. Raghava Rao and *S. Raja Raman* for respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from an appellate order dismissing an application by the Official Receiver in I. P. No. 145 of 1925 to have two gift deeds, executed by the insolvent in favour of two counter-petitioners, declared fraudulent. The adjudication was on 6th January, 1926, on a petition dated 1st December, 1925. The two gift deeds are dated respectively 8th September, 1922 and 22nd March, 1922. The donees are the two wives of the insolvent. Admittedly the deeds are dated more than two years before the date of adjudication. Consequently S. 53 of the Provincial Insolvency Act does not apply, and the question is whether the petition under S. 53 of the Transfer of Property Act is cognizable under S. 4 of the Provincial Insolvency Act. The learned District Munsif held that the petition was barred by S. 53 of the Provincial Insolvency Act. There is no discussion of the matter in his judgment, but the Principal Subordinate Judge has written a fairly long judgment agreeing with the view taken by the Court of First Instance. The main ground on which he decides the matter is, that while the petition might have been cognizable if the original transfer of the property was a nullity, the Insolvency Act does not apply when it is only voidable. I am unable in the light of the decisions of this Court to agree with his view.

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The first case to be considered is *Dronadula Sriramulu* v. *Ponakavira Reddi*[1]. This was under Act III of 1907 which did not contain present S. 4. The alienations there were more than two years old and the question was whether they were within the cognizance of the Insolvency Court. It was there held that the allegations in the petition were sufficient to make the application one to set aside documents as void even though the word *voidable* was used. Applying this view as to *void* and *voidable* in the present case the allegations in the petition of the Official Receiver amount, I consider, to a statement that the deeds are void. He says in paragraph 6:

"In spite of the said gift deeds the insolvent continues to be in possession of the properties in the schedule."

He says in paragraphs 7 and 8 as follows:—

"The counter-petitioners being the wives of the insolvent, and the gift deeds having been executed with the object of keeping back the properties from being available for creditors and thus defeating the claims of the creditors, the gifts are fraudulent and collusive and are therefore voidable as against the Official Receiver."

"The said alienations though made more than two years before the date of the presentation of the insolvency petition, they are not valid under S. 53, Transfer of Property Act, and can therefore be annulled by this Court, under S. 4, Provincial Insolvency Act."

In spite of the use of the word *voidable* he has really said everything that can be said which would show that the deeds were sham and void. If that view is correct, all the authorities are agreed that the Court could take cognizance of the matter. The question has been however argued on the ground that, on the view taken by the learned Subordinate Judge that the Official Receiver only treats the deeds as voidable yet the Insolvency Court has jurisdiction. In the case quoted above, *Dronadula Sriramulu* v. *Ponakavira Reddi*[1], Venkatasubba Rao, J., said that on a review of the decisions it appeared that the preponderance of authority was in favour of holding that under Act III of 1907 the Court in the exercise of its insolvency jurisdiction cannot decide questions relating to adverse claims by or against third parties. In that particular case, the learned Judges held the matter was cognizable because the third party was a creditor and that the Court was entitled to go into the question as to whether his debt was a genuine one under S. 24 of the Act. There are, however, in that case certain remarks about Ss. 53 and 54 which are of great importance in settling the matter now

1. (1923) 45 M. L. J. 105.

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in issue seeing that we have now S. 4 of the Act which did not then exist. The learned Judges there state that Ss. 53 and 54 only lay down rules of evidence and are not exhaustive.

The learned Subordinate Judge relies on a decision in *Pirthiraj Singh* v. *Rukmin Kunwar*[1], but there has been a more important Full Bench decision of the same Court subsequently, *Anwar Khan* v. *Muhammad Khan*[2], where by a majority of two to one the Full Bench held that the Insolvency Court has power to go into the question whether a transfer is voidable under S. 53 of the Transfer of Property Act. They approve of the opinion expressed in *Dronadula Sriramulu* v. *Ponakavira Reddi*[3] that Ss. 53 and 54 of the Insolvency Act are only rules of evidence. With regard to the dissenting judgment in that case, which practically contains the arguments addressed to me on behalf of the respondents, I may note that Sen, J., refused to follow the *dictum* of this Court approved of by the other Judges with regard to Ss. 53 and 54. Since the reasoning of the majority of the Full Bench in *Anwar Khan* v. *Muhammad Khan*[2] follows the view taken by this Court as regards the scope of Ss. 53 and 54, while the dissenting judgment refuses to follow it, there is no reason for my preferring the dissenting judgment. The view that Ss. 36 and 37, now Ss. 53 and 54, merely deal with evidence, had already been taken by this Court in *The Official Receiver, Tinnevelly* v. *Sankaralinga Mudaliar*[4]. Then we have another Madras case, *Chittammal* v. *Ponnuswami Naicker*[5], in which it was held that acting under S. 56 of the Provincial Insolvency Act, the Court cannot direct any person to deliver up any property in his possession to the Official Receiver, unless the insolvent is entitled, on the date of the application under the section, to the immediate possession of the property; if a title, however flimsy, is set up by the person in possession, the Court cannot act under S. 56. But it is open to the Court, on a proper application being made under S. 4 of the Act, to try the issue whether the insolvent is entitled to the property or not. That case is an authority for the Appellant's contention. So also is *Fool Kumari Dasi* v. *Khirod Chandra Das Gupta*[6], where it was held that the Insolvency

1. A. I. R. 1926 All. 415.
2. (1929) I. L. R. 51 All. 550 (F. B.).
3. (1923) 45 M. L. J. 105.
4. (1920) I. L. R. 44 Mad. 524: 40 M. L. J. 219.
5. (1925) I. L. R. 49 Mad. 762: 50 M. L. J. 180.
6. A. I. R. 1927 Cal. 474.

The Official Receiver, West Godavari, Ellore *v.* Sagiraju Subbayya.

Court has jurisdiction to decide questions of title, as between an Official Assignee and a stranger with reference to property which is claimed by the Official Assignee as the insolvent's and which, on the other hand, is claimed by the stranger as his. Their Lordships say that the words of the statute seem to be perfectly plain, and where that is the case, it is not permissible to speculate. I would therefore hold that even if the transaction is only regarded as voidable, the Insolvency Court has jurisdiction to entertain the application. The appeal must therefore be allowed with costs and the petition restored for disposal according to law.

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Muhammad Abu Bakkar Maracair (deceased), Azimuddin, legal representative of the Appellant made supplemental Appellant (*vide* Order, dated 24th April, 1931, on M. P. No. 1043 of 1931) and others .. *Appellants* (Defendant and his L. R. and supplemental appellant)*

v.

Ramakrishna Chettiar .. *Respondent (2nd plaintiff).*

Muhammad Abu Bakkar Maracair *v.* Ramakrishna Chettiar.

Limitation Act (IX of 1908), Art. 182 (5) as amended by Act IX of 1927—Second application for execution returned for amendment—Application re-presented with a third application—Time for third application—Starting point.

A second execution application (filed after the Amending Act IX of 1927 came into force) was returned for correction of some defects and only re-presented along with a third application for execution more than three years from the date of the first application.

Held, that so long as no final orders had been passed on the second application, it was still pending and no question of limitation arose and that the Court should first pass orders on the second application and then, if necessary, consider whether the third application was in time.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly, dated 26th July, 1930, in A. S. No. 34 of 1930 (E. P. No. 456 of 1929 in O. S. No. 100 of 1920 on the file of the Court of the District Munsif of Trichinopoly).

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* C. M. S. A. No. 178 of 1930. 22nd August, 1932.
C. M. Ps. Nos. 1043 and 1044 of 1931.

Muhammad Abu Bakkar Maracair v. Ramakrishna Chettiar.

The Lower Court, dealing with the question of limitation, observed as follows:—

"But the question is whether the application, dated 21st June, 1928, was a proper application in due accordance with law. It is true that it was returned on account of certain defects and was not re-presented. It is contended on behalf of the respondent that that application would not save limitation because under Art. 182 (5) of the Limitation Act limitation runs only from the final order on such application, and as no such order was passed on the petition, it will not save limitation. I am afraid this position is untenable. The object of the second amendment of the Limitation Act was to give an extended period of limitation to the decree-holders. Instead of starting from the date of the application they said it might start from the final order on such application. It does not certainly mean that if there was no such final order the application itself would be useless. An application to execute the decree is certainly a step-in-aid of execution even though it was defective in some particulars. It is not all defects that count but only material defects. It is not pretended that the execution petition of 21st June, 1928, was defective in any material particular. . . . . I must, therefore, hold that the application of 21st June, 1928, was a step for executing the decree in accordance with law, so that the present application was not barred by limitation."

T. M. Krishnaswami Aiyar and *R. Somasundaram* for appellants.

K. S. Narayana Aiyangar and *V. K. Srinivasa Aiyangar* for respondent.

The Court made the following

ORDER.—The facts of the case are clearly stated in the appellate Judge's judgment and need not be re-stated. The question is whether the third application for execution is barred by limitation. Prior to the third application the decree-holder had made another application, the second one in sequence of time, dated 21st June, 1928. That was returned for correcting certain defects and was re-presented only along with the third petition filed on 19th June, 1929. No final orders have been passed on the second application as yet. Time for considering whether the third application is within the period of limitation is to be calculated according to Art. 182 (5) of the Limitation Act in its amended form from the date of the final orders on the last application; that will be the second application in the present case. As no final orders on the second application

have been passed that application is still pending and at present no question for limitation arises. *Vide* judgment of Jackson, J., in C. R. P. No. 5 of 1930. The Lower Court will have to pass orders on the second application and then, if necessary, consider whether the third application is in time. The opinion of the learned Judge that the third application is in time is in the circumstances premature.

Muhammad Abu Bakkar Maracair *v.* Ramakrishna Chettiar.

The argument that the third application should not be considered to be a proper application because it was presented by Ramakrishna Chetty in a different capacity from the capacity in which he presented the other application has no substance and must be overruled.

The two petitions are remanded to the District Munsif for disposal according to law in the light of the above observations. Each party will bear his own costs in this Court.

C. M. P. No. 1043 of 1931.—This will be dealt with by the District Munsif along with the other applications.

C. M. P. No. 1044 of 1931.—No order is necessary.

S. R. —— *Petitions remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Hansraj Gupta and others .. *Appellants**

v.

The Official Liquidators of the Dehra Dun-Mussoorie Electric Tramway Co., Ltd. (in liquidation) .. *Respondents.*

P. C.

Hansraj Gupta *v.* Official Liquidators, Dehra Dun-mussoorie E. T. C. Co., Ltd.

Companies Act (VII of 1913), S. 186—Scope of—"Money due"—Defences open in summary proceedings by liquidator—Time-barred debt not enforceable by summary order—Effect of winding-up on limitation as regards debtors to, and creditors of, the company — Limitation Act (IX of 1908), S. 3, "Explanation"—"Suit," meaning of—Claim against company in liquidation, not per se *a "suit"—Art. 181 whether restricted to applications under Civil Procedure Code—Contract Act (IX of 1872), S. 65—Agreement discovered to be void—Limitation for—Starting point.*

As regards the application of the statute of limitation, there is no analogy between the position of a debtor to, and a creditor of, a company in liquidation; and the winding-up does not prevent the statute from running in favour of persons indebted to the company.

The words "money due" in S. 186 of the Companies Act refer to money due *and recoverable* in a suit instituted by the liquidator in the company's name at the date of the application under the section.

*P. C. Appeal No. 86 of 1930. 16th December, 1932.
Allahabad Appeal No. 34 of 1929.

P. C.

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Section 186 of the Companies Act does not create new liabilities or confer new rights on the liquidator, but merely provides a summary procedure in the winding-up Court against debtor-contributories for enforcing existing liabilities, and the power of the Court, under the section, to order payment is discretionary. In summary proceedings so instituted, every objection is just as open to the person sought to be charged as it would have been if a suit had been brought by the liquidator in the company's name for the same money: *Stringer's case*, (1869) 4 Ch. App. 475 and *Sri Narain* v. *Liquidator, Union Bank of India*, (1922) I. L. R. 4 Lah. 109, approved; *Jagannath Prasad* v. *U. P. Flour and Oil Mills Co.*, (1916) I. L. R. 38 All. 347, distinguished.

Held, accordingly, that if, at the date of the application by the liquidator under S. 186 to recover certain moneys, a suit by him in the name of the company for the recovery of the said moneys would have been dismissed as barred by the Limitation Act, the Court would have no power under S. 186 to order payment to the liquidator of the moneys so claimed.

The word "suit" ordinarily means a civil proceeding instituted by the presentation of a plaint.

A mere claim against a company in compulsory liquidation is not, by virtue of the "Explanation" to S. 3 of the Limitation Act, a "suit instituted" within the meaning of those words in S. 3. The "Explanation" merely enacts that in the case of a suit (*i.e.*, a proceeding instituted by the presentation of a plaint) against a company which is being wound up by the Court, the institution of such suit is (for the purposes of S. 3) advanced to an earlier date, *viz.*, the date when the claim was first sent in to the Official Liquidator.

Quaere: whether Art. 181 of the Limitation Act only relates to applications made under the Civil Procedure Code, or applies also to applications by the Liquidator under S. 186 of the Companies Act: *Bai Manekbai* v. *Manekji Kavasji*, (1880) I.L.R. 7 Bom. 213, referred to.

In a suit to recover money paid under a void agreement,

Held, that for purposes of the Limitation Act, Art. 62 (action for "money had and received"), the *terminus a quo* was the date of the agreement, that being the time at which (in the absence of special circumstances) the agreement was discovered to be void within the meaning of S. 65 of the Contract Act: *Annada Mohan Roy* v. *Gour Mohun Mullick*, (1923) L. R. 50 I. A. 239 : I.L.R. 50 C. 929: 45 M. L. J. 617 (P.C.), relied on.

Judgment of the High Court, Allahabad, (on the question of limitation), reversed.

Appeal No. 86 of 1930 from an original decree passed by the High Court, Allahabad, on the 14th May, 1929, decreeing the claim of the Official Liquidators of the Dehra Dun-Mussoorie Electric Tramway Co., Ltd. against the executors of the estate of the late Lala Raghumal for the recovery of Rs. 69,703-13-0.

The facts of the case are fully set out in their Lordships' previous judgment, delivered on the 28th July, 1932, in connected appeal No. 127 of 1930, *Hansraj Gupta and others* v. *N. P. Asthana and others*, reported in (1932) 63 M. L. J. 859.

Cohen, K. C. (with *W. Wallach*) for appellants.—The two sums of Rs. 27,000 and Rs. 35,000 were in the nature of earnest money, and as the company was primarily responsible for the

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failure of the contract, the testator Lala Raghumal was not liable to refund them.

On the date of the liquidator's application, the three items were barred by limitation. The Court will not, under S. 186, enforce by summary order a time-barred debt: *Sri Narain* v. *Union Bank*[1]. Every objection is just as open to the party proceeded against summarily under S. 186 as it would have been if a suit had been instituted: *Stringer's case*[2] and *Lahore Bank* v. *Kidar Nath*[3] per Shadi Lal, J. Decisions (*e.g., Jagannath Prasad* v. *U. P. Flour and Oil Mills, Ltd.*[4] and *Peoples Industrial Bank, Allahabad* v. *Mohesh Charan Sinha*[5]) upon which the High Court rely, are not relevant, as they relate to the shareholder's liability in respect of unpaid calls, which can be enforced in the winding-up irrespective of the question of limitation, by virtue of S. 156 of the Act.

Proceedings in winding-up have, with reference to the statute of limitation, no effect as regards ordinary debts due *to* the company: In re *Mansel*[6].

The liquidator represents the company and is in no better position than the company: Re *Duckworth*[7], per Lord Cairns.

An Indian Court, as a Court of "Equity and good conscience," is entitled to refuse to entertain claims under S. 186, where if their recovery were sought by suit they would be time-barred.

A petition under S. 186 must be treated by the Court as a plaint in a suit within the meaning of S. 3 of the Limitation Act, as read with the "Explanation" thereto. *See* per Mr. Justice Rattigan in *Daulat Ram* v. *The Woollen Mills Co., Ltd., Delhi*[8].

D. N. Pritt, K. C. and *A. Ralph Thomas* for respondents.—The items in question were not paid as earnest and could not be forfeited: *Kunwar Chiranjit Singh* v. *Har Swarup*[9].

The liquidator's application was governed by Art. 181 of the Limitation Act, and he had three years, from the date of the winding up, to recover the sums in question. Article 181 is not restricted to applications under the Civil Procedure Code, but covers every application made to a Court under any Act, including the Indian Companies Act.

An application under the misfeasance section (235) is, for purposes of the Limitation Act, to be treated as a suit: *see* sub-section

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1. (1922) I. L. R. 4 Lah. 109. 2. (1869) 4 Ch. App. 475 at 484.
3. 36 Punj. R. 1916, p. 104 at 107.
4. (1916) I. L. R. 38 All. 347. 5. (1926) I.L.R. 1 Luck. 153.
6. (1892) 66 L. T. 245. 7. (1867) 2 Ch. App. 578 at 580.
8. 95 Punj. R. 1908 at p. 455.
9. (1925) 50 M. L. J. 629 (P. C.).

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(3) of S. 235, and *Connell* v. *Himalaya Bank, Ltd.*[1] decided under the repealed Act. In the absence of similar provision in S. 186, an application under that section cannot be regarded as a suit within the meaning of S. 3 of the Limitation Act.

"Money due" in S. 186 does not mean "money recoverable". Limitation merely bars the remedy but does not extinguish the debt. Money may be due, though barred by the statute of limitation: Ex parte *Cawley*[2]. The words "at any time" in S. 186 are emphatic. The *Lahore case*[3] is erroneous and should be overruled by the Board. The statute of limitation ceases to run on a winding-up order being made: Ex parte *Lancaster Banking Corporation*: In re *Westby*[4].

[LORD BLANESBURGH.—That case does not deal with debtors to the company.]

In any event, we submit that as regards the item of Rs. 35,000, our claim was within time, as the company had no notice or knowledge of the transaction, and the date of the agreement could not be taken as the time when it was discovered to be void: *Harnath Kunwar* v. *Indar Bahadur Singh*[5].

Cohen, K. C. replied.

16th December, 1932. Their Lordships' judgment was delivered by

Lord Russell of Killowen.

LORD RUSSELL OF KILLOWEN.—For the facts relevant to this appeal their Lordships refer to the judgment which was delivered in July last in the Privy Council Appeal No. 127 of 1930, *Hansraj Gupta and others* v. *N. P. Asthana and others*[6]. The re-argument, therein foreshadowed, of the appeal No. 86 of 1930, has taken place, and their Lordships now proceed to consider whether all or any of the three sums in question in that appeal (*viz.*, Rs. 27,000, Rs. 35,000 and Rs. 7,703-13-0) are or is recoverable.

The principal and most difficult points turn upon the true construction and effect of the Indian Limitation Act, 1908, because their Lordships are of opinion that, apart from any questions of limitation, the three sums in question are all recoverable by the liquidators.

This is obviously so as regards the Rs. 7,703-13-0. As regards the other two sums, it was contended by the appellants that these were not recoverable upon the ground that in each

1. (1895) I. L. R. 18 All. 12.
2. (1889) 34 S. J. 29.
3. (1922) I.L.R. 4 Lah. 109.
4. (1878-9) 10 Ch. D. 776 at 784.
5. (1922) L. R. 50 I. A. 69: I.L.R. 45 All. 179: 44 M.L.J. 489 (P. C.).
6. *Vide* 63 M. L. J. 859.—*Rep.*

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case the sum was paid as a deposit or earnest to secure the due fulfilment of a contract, and that since the Company in each case made default and failed to carry out the contract, the executors were entitled to retain the moneys. Their Lordships are unable to accept this contention, which depends upon a true view of the construction of the respective contracts. Suffice it to say that, having heard the arguments adduced, and having considered the relevant documents, their Lordships are of opinion that the sums of Rs. 27,000 and Rs.35,000 were not, nor was either of them, paid as a deposit or earnest money. They were payments in advance or anticipatory payments, and nothing else.

Their Lordships now proceed to consider the question of limitation, the solution of which depends, in their view, upon the true construction and effect of the Indian Limitation Act, 1908, alone. Decisions in relation to English statutes do not appear to be of assistance.

The material section of the Indian Act is S. 3, which runs thus:

> "Subject to the provisions contained in Ss. 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule, shall be dismissed, although limitation has not been set up as a defence.
>
> "*Explanation.*—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator."

Unless the application which the liquidators made on the 26th March, 1928, was a "suit instituted" or an "application made," for which a period of limitation is prescribed by the First Schedule, no question of limitation in regard thereto can arise.

There is no definition of suit in the Act, beyond the provision, contained in S. 2, that unless there is anything repugnant in the subject or context, "suit" does not include an appeal or an application. The word "suit" ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint. The application of the liquidators would not be a suit within S. 3, if that section stood alone, unaccompanied by the Explanation. An argument, however, was addressed to their Lordships, founded upon the Explanation, to this effect: That the Explana-

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tion shows by its concluding sentence that a claim against a Company in compulsory liquidation (even though made by a proceeding not instituted by the presentation of a plaint) is considered to be a "suit instituted" within those words in S. 3, and that a claim similarly made by or on behalf of such a Company must necessarily, or may similarly, be treated as a "suit instituted" within the section. Their Lordships are unable to accede to this contention. Even if such a claim against such a Company could be held by virtue of the Explanation to be a "suit instituted" within S. 3, there is nothing in the Explanation to justify a similar holding in regard to a claim by such a Company. But their Lordships do not accept the view that a claim against such a Company (not made by a proceeding instituted by the presentation of a plaint) is, by virtue of the Explanation, to be considered to be a "suit instituted" within the section. The Explanation is not concerned with the question of what is a suit, or is to be considered a suit, within S. 3. It is addressed to quite a different subject-matter. It assumes the existence of a suit which has been instituted by the presentation of a plaint, and is concerned only with the point of time at which that suit is for the purpose of S. 3 to be treated as being instituted. The ordinary rule is stated by the Explanation to be that the suit is instituted when the plaint is presented; but to this two exceptions are prescribed, *viz.*, (1) in the case of a suit by a pauper, the time at which that suit is (for the purposes of S. 3) instituted, is to be taken as an earlier date, *viz.*, the date when the application for leave to sue as a pauper was made; and (2) in the case of a suit against a company which is being wound up by the Court, the institution of the suit is (for the purposes of S. 3) advanced also to an earlier date, *viz.*, the date when the claim was first sent in to the official liquidator. Their Lordships are unable to find in an Explanation, which on its face only deals with the point of time at which suits are instituted within the meaning of S. 3, any sufficient justification for extending the meaning of the word suit in that section.

The application by the liquidators cannot therefore be dismissed as being a "suit instituted" after the prescribed period of lmitation.

The application of the liquidators must therefore be treated as an "application made" under S. 3; and the next enquiry

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must be whether any period of limitation is "prescribed therefor by the first schedule" to the Indian Limitation Act. It is common ground that the only Article in that schedule which could apply to such an application is Art. 181: but a series of authorities commencing with *Bai Manekbai* v. *Manekji Kavasji*[1] has taken the view that Art. 181 only relates to applications under the Code of Civil Procedure, in which case no period of limitation has been prescribed for the application. But even if Art. 181 does apply to it, the period of limitation prescribed by that Article is three years from the time when the right to apply accrued, which time would be not earlier than the date of the winding-up order, the 26th March, 1926. The application of the liquidators was made on the 26th March, 1928, well within the three years. The result is that from either point of view the application by the liquidators, if otherwise properly made under and within the provisions of S. 186 of the Indian Companies Act is not one which must be dismissed by reason of S. 3 of the Indian Limitation Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed. The case may be a *casus omissus*. If it be so, then it is for others than their Lordships to remedy the defect.

There is, however, another aspect of the case in which the last-mentioned Act plays a most important part, and that is in considering whether the three sums which the liquidators seek by their application to recover from the appellants were at the date of that application "money due" within the meaning of S. 186. If they were not, then the section had no application and the Court would have had no power to make the order which it made.

From this point of view it is necessary to treat the three items separately, for the purpose of seeing whether if on the 26th March, 1928, the liquidators acting under the powers conferred upon them by S. 179 (*a*) of the Indian Companies Act had in the name of the company instituted a suit against the testator's executors for the recovery of any of those items, that suit would of necessity have been dismissed by reason of the Indian Limitation Act.

1. (1880) I. L. R. 7 Bom. 213.

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As regards the Rs. 35,000, this sum, whether paid under a void agreement with the company, or paid without the company's knowledge or authority, was (subject to a point to be mentioned later) immediately after payment, recoverable by the company as money had and received. In other words, it was repayable on the 13th September, 1922. The period within which a suit by the company to recover the amount would have to be instituted is, under Art. 62 of the first schedule, three years. The debt was accordingly time-barred both before the date of the winding-up order (26th March, 1926) and before the 26th March, 1928.

In regard to the item Rs. 27,000, the company could have recovered this by a suit instituted before the expiry of the period of three years named in Art. 51 in the first schedule, a period which in their Lordships' view began to run on the 1st July, 1923, when the second shipment of goods fell to be delivered under the relevant contract. This debt was accordingly not time-barred by suit at the date of the winding-up order but was so time-barred when the liquidators made their application under S. 186.

In regard to the item Rs. 7,703-13-10, balance of account, a suit by the company to recover it would fall within Art. 85 of the first schedule and would have to be dismissed if not instituted within three years of the 31st March, 1924, being the end of the last accounting year on which the last item admitted or proved was entered in the account. This item is in the same situation for the matter now under consideration as is the second item. The important feature for this purpose is the fact that all three items were statute-barred by suit when the liquidators made their application under S. 186. If on the 26th March, 1928, the liquidators, instead of proceeding in their own name as applicants under S. 186, had in pursuance of their powers under S. 179 (*a*) already referred to instituted a suit in the name of the company by the presentation of a plaint, the Court must of necessity have dismissed that suit under the Indian Limitation Act.

Now, in considering the meaning and effect of S. 186 it is impossible to overlook the fact that it is *verbatim* identical with the corresponding section in the legislation of this country, a section which dates back some 70 years to 1862, and which has appeared in our company legislation ever since. It is there-

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fore a section with an ancestral history. Three features of the section call for notice: (1) It is concerned only with moneys due from a *contributory*, other than money payable by virtue of a call in pursuance of the Act. A debtor who is not a contributory is untouched by it. Moneys due from him are recoverable only by suit in the Company's name. (2) It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights. (3) The power of the Court to order payment is discretionary. It may refuse to act under the section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys.

The old S. 101 of the English Act of 1862 has ever since 1866 been judicially interpreted and administered in accordance with the views expressed in *Stringer's case*[1], viz., that the section is one which provides summary proceedings against debtor-contributories to avoid proceedings in different Courts and to permit a single proceeding in the winding-up Court—but " In those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed." *Stringer's case*[1].

In this country it is difficult to conceive a case in which, so far as limitation is concerned, the section should so operate as to deprive a man of a defence to a claim made by the liquidator which would have been effective against the same claim if brought against him by an action in the company's name.

Whether, in view of the particular terms of the Indian Limitation Act already referred to, such a case could happen in India depends upon the meaning to be attributed to the words in the section " any money due from him or from the estate of the person whom he represents to the Company". And their Lordships are satisfied that the position in this respect is, in India, the same as in this country, for the reason that in view of the place and context in which these words are found, they must be confined in their Lordships' judgment to money due

1. (1869) 4 Ch. App. 475 at 484.

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and recoverable in a suit by the company, and they do not include any moneys which at the date of the application under the section could not have been so recovered.

Their Lordships are glad to find that this view has already prevailed in India. In the case of *Sri Narain* v. *Liquidator, Union Bank of India*[1] it was held that a debt time-barred (and therefore unenforceable in a suit) could not be enforced by a summary order under S. 186, on the ground that the section does not create new liabilities or confer new rights, but merely creates a summary procedure for enforcing existing liabilities. It is true that so far as can be gathered from the report it would seem probable that the debt there in question had become time-barred before the liquidation began, but the decision is not based upon that fact, but upon a view of the section coinciding with the views expressed long ago in *Stringer's case*[2].

The learned Judges, in the present case, took the erroneous view that once the winding up commenced there could be no further application of the rule of limitation in regard to any debt due to the company and not then already time-barred. Their Lordships know of no justification for this view. In this respect there is no analogy between the position of a debtor to, and a creditor of, a company in liquidation.

The learned Judges also considered that the *Lahore case*[1] was in conflict with a decision in the Allahabad Court, *Jagannath Prasad* v. *The United Provinces Flour and Oil Mills Company, Limited*[3]. This, however, is a misconception. The last-mentioned case had no relation to S. 186. It was a case relating to money due on shares in the company which was in liquidation, the liability for which on a winding up became a statutory liability under S. 156 of the Indian Companies Act, 1913.

In their Lordships' opinion the case of *Sri Narain* v. *Liquidator, Union Bank of India*[1] was rightly decided and accordingly there was no power in the Court under S. 186 to order payment to the liquidators of any of the three items in question.

The liquidators made a new submission upon the occasion of the re-argument in regard to the sum Rs. 35,000. They

1. (1922) I. L. R. 4 Lah. 109. 2. (1869) 4 Ch. App. 475.
3. (1916) I. L. R. 38 All. 347.

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claimed that under S. 65 of the Indian Contract Act (IX of 1872) they only became entitled to recover the Rs. 35,000 when the agreement under which it was paid was discovered to be void, and that this discovery was not made until the litigation which culminated in the judgment of the 14th May, 1929, so that this right never became time-barred. Their Lordships cannot accede to this contention. In the absence of special circumstances (and none exist here) the time at which an agreement is discovered to be void within the meaning of S. 65 is the date of the agreement, *viz.*, the 13th September, 1922 (see *Annada Mohan Roy* v. *Gour Mohan Mullick*[1]).

Their Lordships are of opinion that this appeal should be allowed and that the decree of the 14th May, 1929, should be set aside and that in lieu thereof a decree should be made dismissing the application of the liquidators with costs; and they will humbly advise His Majesty accordingly. The respondents must pay the appellants' costs of this appeal.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondents: *Cardew, Smith and Ross.*

K. J. R./S. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD WRIGHT AND SIR GEORGE LOWNDES.

Kunwar Mahabir Singh .. *Appellant**

v.

Kunwar Rohini Ramanadhwaj Prasad Singh .. *Respondent.*

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Mahabir Singh v. Ramanadhwaj Prasad Singh.

Evidence Act (I of 1872), Ss. 106 and 114, Illustration (g)—Party withholding evidence—Adverse inference against—When permissible.

Section 106 of the Evidence Act (relating to the burden of proving fact especially within the knowledge of any person) only applies to parties to the suit.

In order to entitle the Court, under S. 114, Illustration (*g*), of the Evidence Act, to draw inferences unfavourable to the person withholding evidence, the opposite party must satisfy the Court that such evidence was in existence and could be produced.

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*P. C. Appeal No. 50 of 1931. 24th January, 1933.
Allahabad Appeal No. 9 of 1929.

1. (1923) L. R. 50 I. A. 239: I. L. R. 50 C. 929: 45 M. L. J. 617 (P. C.).

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Mahabir Singh *v.* Ramanadhwaj Prasad Singh.

Appeal No. 50 of 1931 from a decree of the High Court, Allahabad, dated the 12th February, 1929, reversing a decree of the Subordinate Judge of Aligarh, dated the 2nd June, 1925.

The litigation related to the succession to an estate called Biswan, and the main question of fact involved in the present appeal was whether one Matmatangadhwaj Prasad Singh was the son of Thakur Garurudhwaja Prasad Singh or not.

Sir Leslie Scott, K. C. and *Sir T. J. Strangman* for appellant.

De Gruyther, K. C. and *Wallach* for respondent.

24th January, 1933. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 12th February, 1929, which reversed a decree of the Subordinate Judge of Aligarh, dated the 2nd June, 1925, and dismissed the suit.

The suit was instituted by the appellant on the 7th September, 1923, claiming absolute possession of an estate called Biswan. The present respondent is now defendant as representative of his brother, the original defendant, who died pending the suit, and is in possession of the estate.

The following table will conveniently show the alternative pedigrees maintained by the parties:—*

The main question at issue turns on the true parentage of Matmatangadhwaj Prasad Singh *alias* Misrilal (hereinafter called "M"). The appellant maintains that he was the son of Shivbaran Singh and Musammat Ram Kunwar, while the respondent maintains that his parents were Thakur Garurudhwaja Prasad Singh (hereinafter called "G") and Rani Basant Kunwar.

On the death of his father, Gir Prasad Singh, in 1880, G. took possession of the estate as owner and held it till his death in 1912. On the 30th June, 1886, his brother, Saparandhwaja Prasad Singh, brought a suit to recover half of the estate from him on the ground that it was a joint estate. The Subordinate Judge dismissed the suit on the 14th January, 1889, on the ground that the estate was impartible and descended by a custom of primogeniture. On the 7th February, 1893, the High Court reversed this decision, but their judgment was

*See next page.

THAKUR GIR PRASAD SINGH
(died in 1880).

Thakur Dhurjan Lal Singh
(died long before suit).

Thakur Ararudhwaja Prasad Singh (died 31st March, 1912). = Rani Basant Kunwar

Shivbaran Singh (died in 1907). = Musammat Ram Kunwar.

Bhagwan Singh.

Thakur Saparandhwaja Prasad Singh (died 25th January, 1910).

Chaudhri Girwar Singh. = Musamma Bhawan Kunwar.

Matmatangadhwaj Prasad Singh *alias* Misrilal (born in or about 1886; died 12th January, 1923).

Shri Dhwaj Prasad Singh, Defendant (died during pendency of suit).

Rohini Raman Dhwaj Prasad Singh, legal representative of Defendant; Respondent.

Matmatangadhwaj Prasad Singh *alias* Misrilal (born in or about 1886; died 12th January, 1923).

Jaswant Singh.

Shri Dhwaj Prasad Singh, Defendant (died during pendency of suit).

Rohini Raman Dhwaj Prasad Singh, legal representative of Defendant; Respondent.

Musammat Chain Kunwar.

Thakur Hamir Singh (died 25th October, 1918). = Musammat Raj Kunwar (died after 22nd January 1920, and before suit).

Niladhwaj Prasad Singh (died 1916).

Kunwar Mahabir Singh, Plaintiff (born 21st April, 1914).

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reversed by this Board on the 27th June, 1900, and the estate was finally held to be impartible.[1]

On the death of G. in 1912, mutation was effected into the name of M. without objection, and M. held the estate without challenge until his death in 1923. His elder son's application for mutation was granted against objection taken by the present appellant, who was left to vindicate his claim by ordinary suit, and the present suit was instituted by him on the 7th September, 1923.

If M. was not the son of G., the appellant's father, Hamir Singh, was entitled to the estate on the death of G., and he died in October, 1918, without having claimed it, the appellant would then have been entitled to it, but he was under four years old at the time of his father's death.

The parties are agreed that M. was born within a year or two after July, 1886. The appellant's case is that he was the son of Shivbaran and his wife and was born at Jarki, and that at some indefinite time later, by an arrangement, he was taken by G. and his wife, Rani Basant Kunwar, who was Shivbaran's sister, and was thereafter treated in every way as their natural son. The respondent's case is that M. was the son of G. and was born of Rani Basant Kunwar at Agra, while she was resident there for a period of a few months for medical treatment.

Extensive evidence, both oral and documentary, was recorded at the trial, and it will be convenient to deal with the documentary evidence in the first place.

The first group of documents relates to three litigations, subsequent in date to the decision of the High Court in February, 1893, that the estate was partible and prior to the reversal of that decision by the Board in June, 1900. In the first suit (102 of 1893) M. was the plaintiff, and defendant No. 1, Madhuri Saran, a mortgagee, denied in his written statement, dated the 23rd August, 1893, that M. was the son of G.; on the same day the suit was allowed to be withdrawn on the ground of defects in the frame of the suit. Their Lordships agree with both the lower Courts that Madhuri's denial is not competent evidence of the fact, as there is no proof of

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1. The judgments of the High Court and by Privy Council are reported in I. L. R. 15 All. 147 and I. L. R. 23 All. 37, respectively.—K. J. R.

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special knowledge on his part. But, while one may speculate as to an ulterior motive for the withdrawal of the suit, their Lordships are of opinion that no such inference may legally be drawn from it. Accordingly this document is of no evidential value. The other two suits, Beni Ram's suit (147 of 1893) and M.'s suit (248 of 1896) to set aside Beni Ram's decree, are merely of value as to two facts which are not now in dispute, namely, that M. was also known as Misrilal, and that, during G.'s life, M. was consistently treated by him as his son, which is consistent with the case of both parties.

The second group of documents is connected with suits filed during the period from June, 1900, to the death of G. in 1912. Two suits (180 of 1900 and 43 of 1901) were filed by a mortgagee, Khundan Sing, in which G., M. and Saparandhwaja were impleaded as defendants and which were tried together. In his written statement in the first suit, dated the 15th January. 1901, Saparandhwaja denied that M. was the son of G. Their Lordships agree with the comment of the High Court: "It is noteworthy that even Sapar Dhwaj, who ought to have known the true facts, did not expressly assert that Mat Matang Dhwaj (M.) was the son of Kunwar Sheo Baran Singh who was then alleged to be his maternal uncle. The point not being a material one was not made the subject-matter of any issue at all. The Court took it for granted that Mat Matang Dhwaj (M.) was the son of Gadur Dhwaj (G.). We find this description both in the judgment and the decree. In the judgment there is even no reference to the denial by Sapar Dhwaj of the parentage of Mat Matang Dhwaj (M.), which was assumed to be correct." It should be added that neither G. nor M. defended the suits.

The next suit was one by Saparandhwaja against G. for maintenance (152 of 1903) in which he obtained a decree for maintenance at the rate of Rs. 200 *per mensem*. The next suit (100 of 1910) relates to a mortgage granted by Durjan Lal, father of Shivbaran, over the joint family property, to which the plaintiff, Musammat Gomti, had acquired right. Shivbaran had died in 1907 and the defendants in the suit were his brother, Bhagwan Singh, and Jaswant Singh and Misrilal, described as sons of Shivbaran. Decree was granted *ex parte* in the suit, and later, on the 26th March, 1912, the three defendants signed a *vakalatnama* for the purpose of getting the suit restored. On

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the 18th May, 1912, the suit was restored to its former number and the *ex parte* decree was set aside. From that time M. took no part in the proceedings and, although his name was in the decree granted, admittedly it could not affect him personally. In the *vakalatnama* he is described as "Kunwar Misrilal, *alias* Matmatangadhwaj Prasad Sing, son of Thakur Garuradhwaj Prasad Singh," and he signs as "Kunwar Matmatangadhwaj Prasad Singh *alias* Misri Lal". Their Lordships agree with the High Court that Musammat Gomti's suit and the proceedings following thereon do not in any way amount to an admission by M. that he was the son of Shivbaran and not the son of G. It was during the course of these proceedings that M. had taken possession of the estate without objection on G.'s death. Reference may be made at this point to two powers of attorney granted by G. to M. in January, 1905, and February, 1907. These are consistent with the appellant's case, but their Lordships find no ground for the appellant's suggestion that they were executed in order to manufacture evidence as apparently the estate was taken over by the Court of Wards in 1907, as stated in Hamir Sing's plaint and the Subordinate Judge's judgment in suit No. 88 of 1913, and the exact date may well have been later than February. Accordingly these powers of attorney are not of material value.

The last group of documents, which relate to the period after G.'s death in March, 1912, are undoubtedly of vital importance. If the appellant's case is well founded, his father, Hamir Sing, was entitled by survivance to the estate. He lived until 1918, and not only failed to claim the estate but acted in a way inconsistent with any such claim. The appellant endeavours to explain and excuse this by evidence of Hamir's poverty, ill-health and weak-mindedness.

On the 6th June, 1912, mutation of names was ordered in favour of M. as the heir of G., without any objection taken, a significant omission on the part of Hamir. On the 14th April, 1913, Hamir filed a suit (88 of 1913) against M. for the full maintenance of Rs. 200 which his father had obtained, the Court of Wards having offered him only Rs. 100 *per mensem*. The suit was dismissed by the Trial Judge and also by the High Court, and he thereafter drew the maintenance of Rs. 100 until his death. In the first place, a claim for maintenance is inconsistent with a claim for ownership of the estate. In the

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second place the plaint, which was verified by Hamir "according to his own knowledge," contains admissions which directly negative the appellant's case. M. is described as the son of G. and as the "gaddinashin" of the Biswan estate, and Hamir was at pains to insert a pedigree, showing M. as the son of G.

As regards Hamir's condition, their Lordships agree with the learned Judges of the High Court in their comments and criticism of the evidence and of the views expressed by the Subordinate Judge. It may be further noted that, apart from the two doctors, not one of the witnesses who spoke as to Hamir's health, and among whom was his sister, suggested that he was weak-minded or unable to understand and transact affairs. Their Lordships are unable to hold it proved that Hamir did not understand his verification of the plaint in April, 1913. A large number of receipts by Hamir for his maintenance allowance were produced. These are of some general value as being inconsistent with Hamir's ownership of the estate, even while the Court of Wards was in charge. The estate was released in February, 1918, and the receipt, dated the 20th October, 1918, expressly admits M. to be the son of G.; but Hamir died of influenza within five days thereafter, which may modify the value of this admission. It is, however, in line with the attitude from which Hamir never departed.

After his father's death the appellant, through his mother, Musammat Raj Kunwar, filed a suit for maintenance (369 of 1919) against M., which was compromised on the 22nd January, 1920, for an *ex gratia* allowance of Rs. 20 *per mensem* to the appellant as a member of M.'s family. Their Lordships agree with the learned Judges of the High Court in their comments on the value of the admission by the appellant's mother of M.'s title to the estate as the son of G.

To sum up the documentary evidence as a whole, the only evidence in favour of the appellant is (*a*) the denial by Saparandhwaja in 1901 that M. was the son of G., and (*b*) any favourable inference to be drawn from the proceedings in the Gomti suit of 1910. These at least show that doubts were then current to some extent as to the parentage of M., but that may be said to enhance the value of Hamir's conduct after the succession opened on G.'s death in 1912 and the admissions by the appellant's mother in 1919. In their Lordships' opinion, it would require very clear and convincing oral testimony to rebut

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the documentary evidence in the respondent's favour and, in particular, the admissions in the maintenance suits of 1913 and 1919.

Their Lordships find it unnecessary to deal with the oral evidence in detail, as they are in substantial agreement with the detailed criticism of that evidence by the learned Judges of the High Court and their criticism of the treatment of that evidence by the Subordinate Judge. In particular, their Lordships are of opinion that the learned Subordinate Judge has erred in two important respects, *viz.*, in not attaching sufficient weight to the documentary proof of admissions in the maintenance suits of 1913 and 1919 and in placing the burden of proof on the respondent. One passage may be cited from the learned Judge's opinion, namely, "All the above witnesses (*i.e.*, the plaintiffs) were in some way or other in a position to have special knowledge as to whether defendant's father was a son of Shivbaran Singh or whether he was a son of Garurudhwaja Prasad Singh (G.). I see no reason to disbelieve them in spite of the fact that their evidence is certainly open to just criticism. From the very nature of the case, plaintiff could not have given better evidence. He could not be expected to have called any witnesses from Jarkhi to depose in his favour. The facts in question being within the special knowledge of Rani Basant Kunwar, the onus of proving them was on the defendant." The concluding sentence appears to rest on an erroneous application of S. 106 of the Indian Evidence Act, which only applies to parties to the suit, of whom Rani Basant Kunwar was not one. Their Lordships apprehend from these observations that, if the learned Judge had given sufficient weight to the documentary evidence and had held the burden of proof to be on the plaintiff, he would have found difficulty in holding the oral evidence to be sufficient to discharge that burden.

It is right to refer to the absence of certain evidence, which the Subordinate Judge regarded as justifying inferences unfavourable to the respondent. As regards the horoscope and the books of account there seems little doubt that these existed, and that, if still available and produced, they would have been of importance as evidence. But the circumstances under which the Court would be entitled to draw inferences unfavourable to the respondent are provided for by S. 114 (*g*) of the Evidence Act, and the Court must be satisfied that the evidence could be

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produced. The appellant has not attempted to prove that the account books are in existence and could be produced. It is most regrettable that the right of discovery is not fully taken advantage of in such a case as this, where documentary evidence, if it is still available, might afford valuable evidence. But the appellant's failure to exhaust this source cannot be used against the respondent. Similarly, in the case of the horoscope, Rani Basant Kunwar named the person in whose possession it might be, but the appellant made no attempt to pursue enquiries as to its existence. With regard to the birth register, it is sufficient to say that it was admitted before their Lordships that registration was not compulsory in Agra at the material period, and this point is of no value.

On the whole matter, their Lordships are of opinion that the appellant has failed to prove his case, and they will humbly advise His Majesty that the decree of the High Court, dated the 12th February, 1929, should be affirmed and the appeal dismissed with costs.

Solicitors for appellant: *Douglas, Grant and Dold.*

Solicitor for respondent: *Solicitor, India Office.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner in Baluchistan.]

PRESENT:—LORD WRIGHT, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Khan Sahib Abdulla Asghar Ali, since deceased (now represented by Khan Sahib Faqir Husain Asghar Ali) and others .. *Appellants**

v.

Ganesh Das Vig, since deceased .. *Respondent.*

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Limitation Act (IX of 1908), Art. 182 (2)—"Final order of the Appellate Court"—Order declaring appeal to have abated—Civil Procedure Code (V of 1908), O. 21, R. 17—Discretion to allow amendments in application for execution.

An order of the Appellate Court holding that the appeal had abated and refusing to set aside the abatement is a "final order" within the meaning of Art. 182 (2) of the Limitation Act, since it deals judicially with the matters before the Court. When an order is judicially made by an Appellate

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*P. C. Appeal No. 47 of 1931. 19th December, 1932.

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Court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Art. 182 (2): *Batuk Nath* v. *Munni Dei*, (1914) L. R. 41 I. A. 104: I. L. R. 36 All. 284: 27 M.L.J. 1 (P. C.) and *Abdul Majid* v. *Jawahir Lal*, (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P. C.), distinguished; *Gohur Bepari* v. *Ram Krisna Shaha*, (1926) 32 Cal. W. N. 387, approved.

Under O. 21, R. 17, Civil Procedure Code, the Executing Court has a discretion to allow amendments in an application for execution.

Appeal No. 47 of 1931 by special leave from an order of the Judicial Commissioner, Baluchistan, dated the 11th March, 1929, affirming an order of the Assistant Political Agent, Quetta-Pishin, dated the 23rd November, 1928, passed in the course of certain execution proceedings.

A decree for money was passed on the 17th November, 1920, against which both the plaintiff and the defendant filed cross-appeals. The plaintiff died during the pendency of the appeals, and his representatives (who were not substituted on the record within the time allowed by law: 90 days, Art. 176, Limitation Act), applied to the Appellate Court for an order holding that the appeal had abated. The defendant contested the application and asked, in the alternative, for an order setting aside the abatement. The Appellate Court thereupon passed an order on the 18th October, 1924, holding that both appeals had abated.

On the 27th October, 1926, *i.e.*, more than 3 years from the date of the decree (17th November, 1920), but within 3 years from the date of the last-mentioned order of the Appellate Court, an application for execution of the decree was made. The Courts in India held, on the authority of *Gohur Bepari* v. *Ram Krisna Shaha*[1] that the application was well in time under cl. (2) of Art. 182 of the Limitation Act, 1908 Thereupon, the judgment-debtor appealed, by special leave, to His Majesty in Council.

Wallach for appellants submitted that there was no final order of the Appellate Court, as contemplated in cl. (2) of Art. 182, and he relied on the Board's judgments in *Batuk Nath* v. *Munni Dei*[2] and *Abdul Majid* v. *Jawahir Lal*[3]. The plaintiff's appeal had abated by operation of law, in accordance with O. 22, Rr. 3 (2) and 11, Civil Procedure Code, and not by reason of any order of the appellate Court.

J. M. Pringle for respondent.—The consensus of opinion in India is that in such cases there is a fresh starting point of limitation as from the date of the order of the Appellate Court: *Gohur Bepari* v. *Ram Krisna Shaha*[1] and the authorities there cited. The

1. (1926) 32 Cal. W. N. 337.
2. (1914) L. R. 41 I. A. 104: I. L. R. 36 All. 284: 27 M. L. J. 1 (P. C.).
3. (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P. C.).

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decisions of the Board, upon which the appellant relies, were distinguished by the learned Judges in the Calcutta case.

19th December, 1932. Their Lordships' judgment was delivered by

SIR GEORGE LOWNDES.—The principal question in this appeal is whether an application for the execution of a decree is time-barred under the provisions of Art. 182 (2) of the First Schedule to the Indian Limitation Act, 1908. The article allows a period of three years only for such an application from the date of the decree, "or where there has been an appeal, the date of the final decree or order of the Appellate Court". It is not disputed that if in the present case the period is to be reckoned from the date of the decree, the application was out of time, nor, *per contra*, if the respondents can take advantage of a certain order of the Appellate Court, that it was within time.

The suit out of which the appeal arises was launched as long ago as 1912. Some four years later it came up in appeal* to this Board, but was sent back for trial in the Baluchistan Courts, where the proceedings dragged on for another 12 years.

On the 17th November, 1920, the decree of which execution is sought was passed in favour of the plaintiff, Ganesh Das Vig, by the Assistant Political Agent, Quetta. Against this decree both parties appealed to the Court of the Judicial Commissioner in Baluchistan. Two years or more were wasted in an abortive reference to arbitration, the arbitrator selected by the parties being the son of the judgment-debtor, and now, as his representative, the principal appellant before the Board. On the 30th July, 1923, the judgment-creditor died. His widow was brought on the record in his appeal but not in that of the judgment-debtor. On the 12th May, 1924, the widow died, and no further substitution was made in either appeal, nor was anything done by the arbitrator.

On the 6th August, 1924, an application was made to the Appellate Court by the present respondents, as the representatives of the judgment-creditor, for an order holding that the judgment-debtor's appeal had abated. Notice was served upon

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*The previous judgment of the Board is reported in *Abdullah Ashgar Ali Khan* v. *Ganesh Dass*, (1917) L. R. 44 I. A. 213: I. L. R. 45 Cal. 442: 34 M. L. J. 12 (P.C.).—K. J. R.

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the judgment-debtor, and he put in a petition in reply denying that his appeal had abated, and asking for an order that the arbitration should proceed, with an alternative prayer that in case the Court should hold that the appeal had abated, an order should be made setting aside the abatement.

Upon these counter-applications both appeals were set down before the Judicial Commissioner who, by an order of the 18th October, 1924, held that both appeals had abated. He said it would be useless to send the matter back to arbitration, and he refused the application of the judgment-debtor to set aside the abatement in the case of his appeal.

It is upon this order of the 18th October, 1924, that the respondents rely to save limitation, and the only question is whether it was a final order of the Appellate Court within Art. 182 (2). Both the Courts in India have held that it was.

The respondents made their application for execution on the 27th October, 1926. The present appellants, the representatives of the judgment-debtor, who was then dead, took various objections to the application, and after the lapse of another two years, a considerable portion of which was occupied in a search by the Court officials for the file of the case, the matter came on before the Assistant Political Agent. Objection to his jurisdiction and to the title of the respondents were disposed of in their favour. They have not been urged before the Board. On the question of limitation, the learned Judge held, following a ruling of the Calcutta Court (*Gohur Bepari* v. *Ram Krisna Shaha*[1]) that the period of limitation should be calculated from the 18th October, 1924, the date of the Judicial Commissioner's order above referred to, and that the application was therefore in time. Having regard, however, to the omission of certain particulars from the application for execution, he returned it to the respondents for amendment. The necessary amendments were made and the application was re-submitted, but apparently before it was considered by the Judge, the representatives of the judgment-debtor lodged an appeal to the Judicial Commissioner. The appeal was argued before him at great length, but was dismissed on the 11th March, 1929, by an order of that date. The learned Judicial Commissioner, though noting that there had been some conflict in the Indian courts as to what

1. (1926) 32 Cal. W. N. 387.

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should be considered a final order of an Appellate Court, agreed with the conclusion to which the Assistant Political Agent had come on the question of limitation. The appellants, with the no doubt laudable ambition of completing the tale of 20 years for the duration of this suit, have appealed to His Majesty in Council against the Judicial Commissioner's decision. Their Lordships, for the reason to be stated, have no doubt that their appeal must fail, but the execution proceedings will still have to be worked out in the Political Agent's Court, and there may still be opportunities to them to delay the satisfaction of what has been so laboriously decided to be a just debt.

In the argument before their Lordships the appellants have relied mainly on two decisions of this Board, *Batuk Nath* v. *Munni Dei*[1] and *Abdul Majid* v. *Jawahir Lal*[2]. Neither of these cases is, in their Lordships' opinion, decisive of the present question. In the first, an appeal to His Majesty in Council had been dismissed for want of prosecution under R. V of the Order in Council of 13th June, 1853. The question before the Board in the reported case was whether under Art. 179 of the second schedule to the Limitation Act of 1877, which corresponds with Art. 182 of the Act of 1908, the assignee of the original decree-holder could claim three years from the date of the dismissal in this Board. It was held that he could not, the reason assigned being that there was no order. Sir John Edge, in delivering the judgment of the Board, says:

"There was, however, no Order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under r. V of the Order in Council of June 13, 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order."

In the second case the question was again as to the effect of the dismissal of an appeal in this Board for want of prosecution. No reference was made to *Batuk Nath's case*[1], which had been decided less than a month before, and it does not appear whether the dismissal had been under the Order in Council, but the effect of the decision was the same. Lord Moulton in delivering the judgment of the Board says:

"The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of the 13th May,

1. (1914) L. R. 41 I. A. 104: I. L.R. 36 All. 284: 27 M. L. J. 1 (P.C.).
2. (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P.C.).

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1901, by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was 12 years from the 13th May, 1901, by virtue of Article 180* of the Indian Limitation Act (1877). Their Lordships see no foundation for this contention which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit, and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

In the case now before their Lordships it is manifest that there was an order of the Appellate Court, and that it did deal judicially with the matters before it. The Judicial Commissioner considered the judgment-debtor's contention that his appeal had not abated, and held that it had. He considered the prayer for revival of the arbitration and refused it. He rejected the application to set aside the abatement. Whether the order made was right or wrong is immaterial: there was no appeal against it, and it was in the circumstances clearly final. Their Lordships think that when an order is judicially made by an Appellate Court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Art. 182 (2) of the Act of 1908. They recognise that there has been some difference of opinion upon this question in Indian Courts, but they think that the principle enunciated above is in accordance with the view taken in the majority of cases and is the effect of the decision reported in *Gohur Bepari* v. *Ram Krisna Shaha*[1] on which both Courts have relied in the present proceedings.

The only other question which has been argued on the appeal is as to the omissions in the application for execution which led to its return to the respondents in the Lower Court for amendment. It is contended for the appellants that no amendment should have been allowed, and that the application should have been rejected. Under O. 21, R. 17 of the Civil Procedure Code the executing Court clearly had a discretion to allow the amendments, and the Appellate Court thought that the discretion had been properly exercised. In these circumstances it is idle to ask this Board to interfere.

*Under Art. 180, 12 years was allowed for the execution of an Order of His Majesty in Council.

1. (1926) 32 C W. N. 387.

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In their Lordships' opinion this appeal fails and should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Rankin, Ford & Chester.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD WRIGHT AND SIR GEORGE LOWNDES.

Shrimati Kalawati Devi .. *Appellant**

v.

Dharam Prakash .. *Respondent.*

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Shrimati Kalawati Devi v. Dharam Prakash.

Hindu Law—Adoption—Power to adopt—Construction—Prohibition against adopting any son " of the relations of her (the wife's) family "— Khandani rishtadaran*—Wife's niece's son, whether within the prohibited class—Estoppel—Absence of representation of fact by adopting mother.*

The testator, a Hindu, who died in 1896 without issue but leaving two widows (Mst. Kalawati and Mst. Basanti) and his mother, Mst. Bhawan Kunwar, authorised his widow, Mst. Kalawati, to adopt a son to him, but stipulated " that she shall not adopt any son of the relations of her family (*khandani rishtadaran*) or of that of Mst. Basanti or Mst. Bhawan Kunwar".

In 1918 Mst. Kalawati, purporting to act in pursuance of the authority conferred on her by the will, adopted the defendant-respondent, who was a son of her brother's daughter. In a suit brought by Mst. Kalawati in 1924 for a declaration that the adoption was null and void,

Held (1) that the adoption was invalid, as the adopted boy (the defendant) was a blood relation (*khandani rishtadar*) of the plaintiff, Mst. Kalawati, and came within the prohibition contained in the will, and

(2) that there being no evidence to show that any representation of fact had been made by the plaintiff, she was not estopped from bringing the present suit.

Judgment of the High Court, Allahabad, (I.L.R. 50 All. 885), reversed.

Appeal No. 126 of 1929 from a judgment and decree of the High Court, Allahabad, dated the 25th May, 1928, reversing a judgment and decree of the Court of the Subordinate Judge of Meerut, dated the 21st May, 1925.

The main questions for determination on the appeal were: (1) whether on a true construction of the will of the late Ram Saran Das, the adoption of the respondent was prohibited and was therefore invalid, and (2) whether the appellant, by reason of her conduct, was precluded from challenging the adoption of the respondent.

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*P. C. Appeal No 126 of 1929. 12th January, 1933.
Allahabad Appeal No. 38 of 1928.

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Shrimati Kalawati Devi *v.* Dharam Prakash.

Sir Leslie Scott, K.C. and *J. Nissim* for appellant.—The Trial Judge was right in holding, on the authority of Karamat Hussain, J.'s judgment in *Radhag Pershad* v. *Mst. Nana*[1] that the expression "*khandani rishtadaran*" meant relations by blood or marriage. The respondent's adoption was therefore expressly prohibited by the terms of the will. As to the meaning of the word "khandan," refers to Wilson's Glossary, p. 277, and to *Sher Bahadur* v. *Ganga Bakhsh Singh*[2].

[LORD THANKERTON referred to the Board's recent judgment in *Dulahin Jadunath Kuar* v. *Raja Bisheshar Bakhsh Singh*[3] and to the judgment of Sir Robert Phillimore in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*[4] on the correct interpretation of the term "gotra" or family.]

The High Court were wrong in holding that the prohibition was only against adopting a son of the *agnatic* relations of the testator's widows or mother.

Subba Row for respondent.

(Plea of estoppel abandoned in argument.)

The respondent's adoption was outside the prohibition imposed by the testator. He (the respondent) was a son of Mst. Kalawati's niece, and was a stranger and not a member of the family.

[SIR GEORGE LOWNDES remarked that the testator's object, as indicated by the will, was that the property should not go to his wife's relations at all.]

Sir Leslie Scott, K.C., replied.

12th January, 1933. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—The appellant is a widow of Ram Saran Das, a Hindu, who died in December, 1896, without issue, but leaving two widows, namely, (1) the appellant, Musammat Kalawati, and (2) Musammat Basanti, and his mother, Musammat Bhawan Kunwar. He left considerable property, moveable and immoveable, and shortly before his death he had executed a will on the 6th December, 1896, under which he made the appellant the absolute owner of his property and gave her full powers of disposal and alienation in any way she liked. He also fixed certain allowances for Musammat Basanti and Musammat Bhawan Kunwar and made provision

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1. 5 I. C. 669 (All.).
2. (1913) L.R. 41 I. A. 1 : I. L. R. 36 All. 101 : 26 M. L. J. 291 (P.C.).
3. (1932) L.R. 59 I.A. 173 : 36 C. W. N. 1073 : 63 M. L. J. 287 (P.C.).
4. (1870) 13 M. I. A. 373.

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for a residence for them. As regards adoption, he made the following provision, viz.:

"I authorise Musammat Kalawati to adopt when she wishes, after my death, anybody whom she likes. After making an adoption, Musammat Kalawati or the (adopted) son shall have no power to make a transfer of my property till the life-time of Musammat Kalawati. Musammat Kalawati shall act as guardian of the adopted son so long as he does not come of age, and, during his minority, she shall have power to carry on the management of the property. After the attainment of majority by the adopted son, he and Musammat Kalawati will have power to carry on the management and to enjoy the income of the property, either jointly or in equal shares."

On the 10th December, 1896, the testator amended his will by the addition of the following provision:—

"Further it is stipulated that if Musammat Kalawati should like to adopt a son, she shall not adopt any son of the relations of her family or of that of Musammat Basanti or Bhuwan Kunwar. If my brother, Jiwan should give his son into adoption she should adopt him otherwise she should adopt some other boy, and she shall not have a power to make a gift. In case of necessity Musammat Kalawati shall have power to sell or mortgage a portion of the property."

The testator's brother having declined to give his son in adoption, the appellant, on the 8th August, 1918, adopted the minor respondent according to the usual forms as a son to herself and her deceased husband, and, of the same date, she executed a deed of adoption in his favour, which purported to proceed in accordance with the provisions of the will. The factum of adoption is not disputed.

The minor respondent is a son of Musammat Chandrawati, a daughter of the appellant's brother, Brij Ballabh Saran.

On the 28th May, 1924, the appellant instituted the present suit against the respondent, asking for a declaration,

"that the deed of adoption, dated the 8th of August, 1918, executed by the plaintiff in favour of the defendant is null and void as against the plaintiff according to law, and that the defendant is not the adopted son of the plaintiff or her husband; nor can he acquire any right under the document aforesaid, in respect of the property left by Lala Ram Saran Das, deceased."

Of the various grounds on which the appellant maintained the invalidity of the adoption, the only one to be now considered rests upon the prohibition contained in the addition to the will against adoption of "any son of the relations of her family or of that of Musammat Basanti or Bhuwan Kunwar," within which the appellant contends that the respondent is included. The respondent, in addition to traversing this contention, maintained that the claim for cancellation of the deed of adoption was time-barred and that the whole claim was barred by estoppel.

P. C.

Shrimati Kalawati Devi v. Dharam Prakash.

Lord Thankerton.

The Subordinate Judge, by decree dated the 21st May, 1925, decided in favour of the appellant and ordered and decreed "that it is declared that Dharam Prakash, the defendant, is not the adopted son of the plaintiff and that his adoption was invalid". By an obvious error the words "or of her husband" are omitted after "plaintiff". The learned Judge held that the respondent was within the prohibited class and rejected the pleas of limitation and estoppel. On appeal this judgment was reversed by the High Court of Judicature at Allahabad and the suit was dismissed by decree dated the 25th May, 1928. The learned Judges agreed with the Subordinate Judge as to the plea of limitation, but they held, on construction of the prohibition, that the respondent was not affected by it; they also held that the appellant's claim was barred by estoppel. The appellant now appeals from that judgment.

The only question for their Lordships' decision is as to the proper construction of the clause of prohibition, as the respondent conceded that he was unable to support the judgment appealed against on the ground of estoppel. This ground was opened upon by the appellant's counsel, and their Lordships are of opinion that the respondent's counsel rightly conceded that there was not evidence to show that any representation of fact had been made by the appellant, as was found by the High Court.

The question for decision turns on the sense in which the testator used the words "relations of her family," which are the translation given of "khandani rishtadaran". There can be no doubt that the substantive "rishtadaran" will include relations by blood or marriage, but in what sense did the testator use the adjective "khandani" (of the family)?

The learned Judges of the High Court have held that, in the case of a Hindu, his "khandan" consists of his lineal ascendants and descendants and his collaterals in the male line, and that sisters and daughters after marriage are transplanted from the family and acquire the lineage or gotra of their husbands. They point out that the respondent's mother, on her marriage, ceased to belong to her father's family or khandan, and that the respondent is therefore not a "khandani rishtadar" of the appellant and they hold that the testator must have used these words in the above sense. But, in the opinion of their

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Lordships, this construction defeats itself, for the three ladies named—on that view—had all changed their family, on marriage, to the family of the testator and his father, and the effect of the learned Judges' construction of the clause would be to prohibit the adoption of agnates of his own family. Common sense is against any such intention on the part of the testator, and any such intention is inconsistent with his express direction to give a preference, in adoption, to his own brother's son. It is clear, in their Lordships' opinion, that the testator was using the word "khandan," which is a word in general use, in a general sense as applying to blood relations of the ladies named, and that, accordingly, the respondent falls within the prohibited class and his adoption was invalid.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court, dated the 25th May, 1928, should be set aside, that the decree of the Subordinate Judge, dated the 21st May, 1925, should be varied by inserting the words "or of her husband" after the words "adopted son of the plaintiff" and should otherwise be affirmed, and that the appellant should have the costs of this appeal and her costs in the High Court.

Solicitors for appellant: *Douglas, Grant and Dold.*

Solicitor for respondent: *Ram Singh Nehra.*

K. J. R. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

M. Savudi Karuppanan Ambalam .. *Petitioner** (*Appellant—Accused*)

v.

Guruswami Pillai and another .. *Respondents* (*Complainants*).

Karuppanan Ambalam *v.* Guruswami Pillai.

Criminal Procedure Code (V of 1898), S. 517—Offences of theft and receipt of stolen property—Exoneration of accused—Order for return of property seized—Question of ownership if material.

Where a person accused of theft is acquitted and claims as his own the property seized from him by the Police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary. The question of ownership should in such cases be left to be decided by the Civil Court and the Magistrate should not direct the property seized to be handed over to the complainant merely because he considers him to be the owner.

Vaiyapuri Chetty v. *Sinniah Chetty*, (1930) 59 M. L. J. 901 and *Sattar Ali* v. *Afzul Mahomed*, (1926) I. L. R. 54 Cal. 283, referred to.

*Cr. R. Cases Nos. 717 and 718 of 1932. (Cr. R. Ps. Nos. 670 and 671 of 1932). 18th January, 1933.

Karuppanan Ambalam *v.* Guruswami Pillai.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate of Madura in C. A. Nos. 3 and 4 of 1932 (C. C. Nos. 145 and 146 of 1932 on the file of the Court of the Second Class Magistrate of Madura Taluk).

F. S. Vas for petitioner.

K. V. Sesha Aiyangar for respondents.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

The Court made the following

ORDER.—These cases are precisely similar. The Sub-Magistrate found that the Petitioner (the accused in both cases) was not guilty of the offence of theft or of dishonestly receiving stolen property (Section 379 or 411, Indian Penal Code). He found in fact that the Petitioner had purchased both the bulls for fair prices and without any reason to suppose them to be stolen property. Nevertheless he ordered the bulls to be returned to Meenammal and Pandia Muppan whom after enquiring he considered to be the owners. He was satisfied, he says, that the bulls had been stolen though he does not say whence, by whom or when.

The general rule in such cases is that where a person accused of theft is acquitted and claims as his own the property seized from him by the Police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary. This is the principle generally recognised in this Court (vide *Vaiyapuri Chetty* v. *Sinniah Chetty*[1]). In the present case the learned Sub-Magistrate has not given any reason for departing from this principle. He appears to have thought that the decision of the question of ownership was sufficient to justify an order to return the property to the owner. This is extremely unsound as has been explained by Rankin, C. J., in *Sattar Ali* v. *Afzal Mahomed*[2]. The Criminal Courts ought not to be used to short circuit the Civil Courts in this way. When it appears that the Petitioner bought the animals honestly, the question whether he or the former owners is, or are, now entitled to them should be left to be

1. (1930) 59 M. L. J. 901. 2. (1926) I. L. R. 54 Cal. 283.

decided by the Civil Court. It is not a question into which the Criminal Court should enter.

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Since it is clear that the learned Sub-Magistrate has overlooked the fundamental principle that when property is seized from a person who is afterwards acquitted of stealing it, the property should ordinarily be returned to that person, he cannot be said to have exercised his discretion in a judicial manner. I therefore set aside his order and direct that the bulls be returned to the Petitioner from whom the Police took them.

B. V. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE BARDSWELL.

Thirupuraneni Narayana Rao .. *Appellant** (*Respondent*)

v.

Soorapaneni Veerayya and others.. *Respondents* (*Petitioners*).

Narayana Rao v. Veerayya.

Civil Procedure Code (V of 1908), O. 41, R. 10 and O. 44, R. 1—Pauper appeal—Order for security for costs—Validity—Leave to appeal as pauper—When can be granted—Need for Court stating reasons.

Ordinarily when a party has been allowed to appeal as a pauper there should be reasons other than mere poverty justifying an order being made upon him to furnish security for the costs of his appeal and the fact that leave has been granted to him to appeal in *forma pauperis* should of itself be sufficient to show that the judgment appealed against upon a perusal of it appears to be contrary to law or otherwise erroneous or unjust. Where, however, leave to appeal has been granted in contravention of the requirement of law, the Court may order the appellant to furnish security for the costs of his appeal even though he be a pauper.

In re *Carroll*, (1931) 1 K. B. D. 104, referred to.

When a pauper litigant comes to the appellate Court for leave to continue the litigation as a pauper it is incumbent upon him to satisfy the Court that the judgment is erroneous or unjust. This does not mean a final decision by the Court, but such a decision as can be given after a perusal of the judgment and the decree. It is not enough in such cases that the applicant shows that he has a *prima facie* good case or an arguable point.

In re *Chennamma*, (1929) I. L. R. 53 Mad. 245: 58 M. L. J. 195, dissented from.

Sakubai v. *Ganpat*, (1904) I. L. R. 28 Bom. 451, *Rajendra Prasad Bose* v. *Gopal Prasad Bose*, (1924) I. L. R. 4 Pat. 67 and *Maung Tha Din* v. *Daw Paw*, A. I. R. 1925 Rang. 249, referred to.

Where the Court grants leave to appeal under O. 44, R. 1, Civil Procedure Code, the reasons for granting such leave should be briefly stated.

Appeal under Cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Burn, dated the 8th day of

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*L. P. A. No. 96 of 1932. 24th February, 1933.

Narayana Rao v. Veerayya.

November, 1932 and made in C. M. P. No. 3515 of 1932 in Appeal No. 58 of 1932 preferred to the High Court against the order of the Court of the Subordinate Judge of Masulipatam in O. S. No. 56 of 1929.

J. Sambasiva Rao for appellant.

A. Lakshmayya for respondents.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—This is a Letters Patent Appeal from an order of Burn, J., ordering the appellant to give security for the costs of his appeal. The appellant here has been given leave to appeal in *forma pauperis*. Burn, J., ordered the appellant to furnish security for Rs. 1000 and it is contended on behalf of the appellant that the order of Burn, J., being based merely upon the poverty of the appellant and nothing more, is wrong. It is quite true that our learned brother Burn, J., has given no other reason for ordering the appellant to furnish security but it is quite open to us to see whether good reasons exist for such an order being made. It is contended here that security for costs can only be ordered to be given by a pauper appellant in special circumstances: *Seshayyangar* v. *Jainulavadin*[1], *Srinivasa Sastrial* v. *Subramania Aiyar*[2] and *Subbiah Thevar* v. *Balasubramania Pandia Thalavar*[3]. I agree that ordinarily where an appellant has been allowed to appeal as a pauper there should be reasons other than poverty justifying an order being made upon him to furnish security and the fact that leave has been granted to him to appeal in *forma pauperis* should of itself be sufficient to show that the judgment appealed against upon a perusal of it appears to be contrary to law or otherwise erroneous or unjust. Unfortunately, following what is stated to be the practice of this High Court, leave to appeal in *forma pauperis* has been granted frequently on the ground that the appeal raised a substantial question of law or that *prima facie* the appellant had a good case or an arguable point; and there is one reported decision of this High Court, In re *Chennamma*[4], by Venkatasubba Rao and Madhavan Nair, JJ., where it was held that O. 44, R. 1 of the Civil Procedure Code does not contemplate that, before granting leave to appeal in *forma pauperis*, the Court should

1. (1880) I. L. R. 3 Mad. 66. 2. (1907) 17 M. L. J. 583.
3. 1931 M. W. N. 1157.
4. (1929) I. L. R. 53 Mad. 245: 58 M. L. J. 195.

arrive at a definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust, that it is enough if the applicant shows that he has *prima facie* a good case and that, if he does so, leave to appeal should be granted. With great respect to the learned Judges who have decided *that case*, I am unable to see that O. 44, R. 1 of the Civil Procedure Code contemplates anything else but what it so definitely states. The proviso is perfectly clear, namely,

"that the Court *shall* reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust."

The order is mandatory and only contemplates a perusal of the application, the judgment and the decree and nothing else; and unless in the opinion of the Court the decree is contrary to law or otherwise erroneous or unjust, the Court is bound to dismiss the application. O. 44, R. 1, Civil Procedure Code, does not say that the Court shall reject the application unless the appeal raises a substantial question of law or unless the appellant has *prima facie* a good case. I am unable to agree with the decision in In re *Chennammal*[1] and in my opinion this Bench should not follow it. It is certainly in conflict with the view of Jenkins, C. J., in *Sakubai* v. *Ganpat*[2] and also *Rajendra Prasad Bose* v. *Gopal Prasad Bose*[3] and *Maung Tha Din* v. *Daw Paw*[4]. Upon perusing the judgment in this case it is very difficult to understand how leave to appeal in *forma pauperis* was ever granted at all. The learned Judge who granted the application has not given his reasons for doing so; and I may here state that I think that, when such leave is given, the reasons of the Court for granting such leave should be briefly stated. I am quite unable, after a careful perusal of the judgment under appeal, to say that on the face of it, it is contrary to law or otherwise erroneous or unjust. It certainly raises no substantial question of law and therefore does not even satisfy the test applied in In re *Chennammal*[1]; nor, in my opinion, does the appellant show even a *prima facie* good case, and, as I have already stated, no reasons have been given by

1. (1929) I. L. R. 53 Mad. 245: 58 M. L. J. 195.
2. (1904) I. L. R. 28 Bom. 451. 3. (1924) I. L. R. 4 Pat. 67 at 73.
4. A. I. R. 1925 Rang. 249.

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Beasley, C.J.

the Court for allowing the application. What appears to me to have been overlooked in In re *Chennamma*[1] is the difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. In the former case, apart from the question of pauperism, the only test applied is whether there is a cause of action shown; but when the appellate stage is reached, a more severe test has to be applied. The defendant has been successful in the Lower Court and he has been put to great cost in successfully defending the suit and in most cases he has not been able to recover one anna from the plaintiff towards his costs. Therefore it is that when the pauper litigant comes to the appellate Court for leave to continue the litigation as a pauper, it is incumbent upon him to satisfy the Court that the judgment is erroneous. This does not mean a final decision by the Court, but such a decision as can be given after a perusal of the judgment and the decree. On the question as to security for costs being ordered where leave to appeal has been granted, I think that it is permissible for the Court to peruse the judgment which is being appealed against and to see whether there are circumstances which would justify an order for security for costs. In my opinion, the chance of the appellant's success is such a circumstance. In the present case, taking the view that I do that the appellant has not *prima facie* a good case, I am satisfied that this is a case for ordering the appellant to furnish security for costs even though he be a pauper. The fact that a person is a pauper is not alone a reason for not ordering him to give security for costs and this is the view taken by Scrutton, L. J., in In re *Carroll*[2]. He there states:

> "On the question of ordering security for costs I desire to say this: the mere fact that a person is in poor circumstances does not justify security being ordered where that person is making his first effort to obtain a decision. A perfectly impecunious person may commence proceedings by the issue of a writ which may involve the defendant in a large sum for costs because the plaintiff, who, I will assume, is unsuccessful, has no funds. As I have sometimes expressed it, the Courts allow an impecunious person to get one bite of the cherry but will not allow him a second bite unless he, as appellant, is able to provide security for the costs of the appeal."

Although Burn, J., has given no reason other than the poverty of the appellant for making his order, for the reasons

1. (1929) I. L. R. 53 Mad. 245: 58 M. L. J. 195.
2. (1931) 1 K. B. D. 104 at 108.

I have already stated, his order must be upheld and this Letters Patent Appeal dismissed with costs.

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One month for finding the security ordered.

Bardswell, J.

Bardswell, J.—I agree. As to O. 44, R. 1 I cannot see why it should be taken to mean something less than what appears from its plain language.

B. V. V. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CORNISH.

Muthalakkammal .. *Appellant** (*Petitioner-Defendant*)

v.

Narappa Reddiar (minor) by mother and next friend Nagammal .. *Respondent* (*Respondent-Plaintiff*).

F. B. Muthalakkammal v. Narappa Reddiar.

Civil Procedure Code (V of 1908), Sch. I, O. 32, R. 7—Applicability to execution proceedings.

Order 32, R. 7 of Schedule I of the Code of Civil Procedure applies to execution proceedings.

Virupakshappa v. *Shidappa and Basappa*, (1901) I. L. R. 26 Bom. 109, *Arunachellam Chetty* v. *Ramanadhan Chetty*, (1905) I. L. R. 29 Mad. 309 and *Shaik Davud Rowther* v. *Paramasami Pillai*, (1916) 31 M. L. J. 207, referred to.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin, dated 19th February, 1929 and made in Execution Application No. 1170 of 1928 in O. S. No. 85 of 1925.

K. V. Sesha Aiyangar for appellant.

B. Somayya for *P. Vedachala Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—The decision in *Arunachellam Chetty* v. *Ramanadhan Chetty*[1] was in accordance with the earlier decision in *Virupakshappa* v. *Shidappa and Basappa*[2] though the latter decision was not actually cited. In the latter case, Sir Lawrence Jenkins, C. J. and Chandavarkar, J., held that proceedings in execution are proceedings in suits and that the

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*C. M. A. No. 376 of 1929. 6th January, 1933.

1. (1905) I. L. R. 29 Mad. 309. 2. (1901) I. L. R. 26 Bom. 109.

F. B.

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compromise of such a proceeding is a compromise with reference to the suit. These decisions were followed in this Court in *Shaik Davud Rowther* v. *Paramasami Pillai*[1].

In *Fani* v. *Surendra*[2] the rules of O. 32, Sch. I of the Code of Civil Procedure which were in question were Rr. 1, 3 and 11 and the decision did not turn on the applicability of O. 32, R. 7. The same remarks apply to *Rakhal Chandra De* v. *Mt. Kumidini Debya*[3] and *Bansi Dhar* v. *Md. Suleman*[4]. In *Ram Gulam Sahu* v. *Sham Sahai Das*[5] the learned Judges did not give a final opinion as to the applicability of O. 32, R. 7 in execution, but held that, if it did not apply, the principles of it would apply. We do not think that the authority of *Arunachellam Chetty* v. *Ramanadhan Chetty*[6], *Virupakshappa* v. *Shidappa and Basappa*[7] and *Shaik Davud Rowther* v. *Paramasmi Pillai*[1] is shaken by *Arunachellam* v. *Veerappa Chettiar*[8]. It is unnecessary to refer in detail to certain other Madras cases cited by the learned Advocate for the appellant as they relate to transfer of decrees. We are therefore of opinion that O. 32, R. 7, Sch. I of the Code of Civil Procedure applies to execution proceedings.

The learned Advocate for the appellant now applies to us for sanction of the adjustment. The respondent opposes this on the ground that the award and the decree on the award are collusive. The Subordinate Judge will now enquire into the question whether the adjustment is a proper adjustment and dispose of the matter according to law.

Costs will abide the result.

B. V. V. *Case remanded.*

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1. (1916) 31 M. L. J. 207.
2. (1921) 35 C. L. J. 9.
3. A. I. R. 1927 Cal. 930.
4. A. I. R. 1926 Lah. 490.
5. (1920) 5 Pat. L. J. 379.
6. (1905) I. L. R. 29 Mad. 309.
7. (1901) I. L. R. 26 Bom. 109.
8. (1931) I. L. R. 55 Mad. 17: 61 M. L. J. 348 (F. B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Sri Rajah Satrucherla Sivaskandaraju Bahadur Garu and others .. *Appellants** (*Petitioners—Judgment-debtors 4, 5 and 6*)

v.

Sri Narasimha Pattamani *alias* Padmavati Pattamani Devi Garu and others .. *Respondents* (*Respondents — Auction purchasers Nos. 1 and 2 and Judgment-debtors 2, 8 and 9*).

Sivaskandaraju Bahadur Garu *v.* Sri Narasimha Pattamani.

Civil Procedure Code (V of 1908), O. 21, R. 90—Sale of villages directed to be held in two lots—Proclamation describing village but not lot—Irregularity—Proof of injury—Circumstantial evidence if relevant—Sale held from day to day and unduly prolonged—Court fixing date for termination of sale—Propriety—Undervaluation in sale proclamation—Sale when vitiated—Statement of witness given on oath—Court whether can ignore without contrary evidence.

Where a sale was ordered to be made in two lots, each lot comprising several villages, and though a proper proclamation stating that each estate would be sold as a whole in one lot was duly put up in the District Court-house, in the Collector's Office and in the proper place in each of the two estates, the copy of the proclamation which was affixed in each village described as the subject of the sale the particular village at which that copy was posted and not the lot of which that village was a part, but it was not shown that the bidders were misled on that account,

Held, that the wrong description of the property in the specimen proclamation put up in the several villages was a material irregularity but the sale was not under the circumstances vitiated on that account.

An applicant under O. 21, R. 90, Civil Procedure Code, can show by circumstantial and not merely by direct evidence that the injury caused to him was the result of the irregularity alleged by him.

A Court-sale should not be unduly prolonged. Nor is it proper for the Court to fix a time for the termination of the sale. Where a sale was directed to be continued from day to day from 27th June to 31st July,

Held, that the procedure adopted was irregular.

Per *Reilly, J.*—An undervaluation of the property in the sale proclamation is an irregularity but the sale need not be set aside on that account unless it is shown to have led to the property being sold for less than what it would have otherwise fetched.

Where a sale is directed to be continued until a particular day it may be taken that the Court intended that it should stop at the close of the Court-hours on that date.

Per *Venkatasubba Rao, J.*—Where there is nothing to show that the statement of a witness given on oath is inherently improbable it would be wrong to hold that such statement is false when not only it remains uncontradicted but when the opposite party, who challenges it, deliberately abstains from adducing evidence to the contrary.

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*C. M. A. Nos. 412 and 413 of 1930. 5th October, 1932.

Sivaskandaraju Bahadur Garu v. Sri Narasimha Pattamani.

Appeal against the order of the District Court of Vizagapatam, dated the 7th day of October, 1929 and made in E. A. Nos. 469 and 470 of 1928 (E. P. No. 9 of 1927).

K. Ramanatha Shenai, V. Govindarajachari, K. Krishnamurthi and *B. V. Ramanarasu* for appellants.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *P. Somasundaram* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—The first question with which I propose to deal is, whether the judgment-debtors have sustained substantial injury within the meaning of O. 21, R. 90. If this point is answered in the negative, the consideration of the other questions raised becomes unnecessary. In regard to the injury alleged, there is one puzzling feature in the case, to which I shall presently refer. But, apart from that, we have to decide whether the Lower Court's finding that no damage has been sustained is correct or not. The sale commenced by order of Court on the 27th June, 1928: leave to bid was granted to the decree-holders on the 12th July and on the last mentioned date an order was made directing that the sale was to proceed from day to day to the end of July. On the 17th July the Zamindar of Andhra bid Rs. 2,50,000 for each of the two lots. It may be mentioned that the Zamindar is a near relation of one of the judgment-debtors. On the 31st July there was no further bid made until the decree-holders offered for each lot a sum of Rs. 1,000 more. At 5 P.M. on the 31st July the sale was concluded and the decree-holders were declared the purchasers, their bid for Rs. 2,51,000 for each of the two lots having been accepted by the Court.

The sale proclamation was settled on the 17th April, 1928. It may be mentioned that this estate had been for several years in the possession of Receivers appointed by the Court. At the time when the learned Judge settled the proclamation, he obtained the necessary information from the Receiver then in charge and arrived at the reserve price. The income was about Rs. 22,000 a year, and the Judge fixed the value of the property as being twenty times the annual income. On that calculation, the reserve price was fixed at Rs. 2,25,969 for one lot and Rs. 2,12,888 for the other. At the sale by auction, the price fetched was slightly higher than these sums. Not only was the sale advertised in the usual manner, but wide publicity was

given by announcements in various leading newspapers. We may adopt another method for testing whether the amounts mentioned in the proclamation as the reserve price were an under-estimate. One of the mortgages in favour of the plaintiff was granted in 1906. The instrument of mortgage describes the property in great detail; the name of each village is shown there and the total income as stated in the deed was Rs. 29,000, less peishcush Rs. 9,000. In other words, the net income of the properties as stated in the deed was Rs. 20,000. Adopting this test, it cannot be said that there has been inadequacy in the sale price realised at the auction.

But there remains the evidence of P. W. 5, on which very rightly Mr. Ramanatha Shenai, the learned Counsel for the appellants, has laid much stress. P. W. 5 is the standing vakil of the Andhra Zamindar. He deposes that in his presence the Zamindar proposed to the Dewan of Jeypore offering to purchase one of the two lots for 4½ lakhs, but the Dewan was unwilling to part with it for less than 5 lakhs. This witness's statement is direct and unequivocal. If his evidence was untrue, why was not the Dewan of Jeypore called to contradict him? Mr. Ramanatha Shenai says that, in the absence of evidence to the contrary, we must accept the evidence of P. W. 5. The learned Judge is alive to this difficulty, but gets over it by finding definitely that this witness's evidence is false. I am afraid I must most strongly differ from this view. On what material does the learned Judge hold that this witness cannot be believed? How is he justified in coming to the conclusion that his evidence is perjured? Where there is nothing to show that the statement is inherently improbable, it would be wrong to hold that a statement given on oath is false, when not only it remains uncontradicted but when the opposite party, who challenges it, deliberately abstains from adducing evidence to the contrary. In this case, whatever my conclusion may be, I am definitely of the opinion that the Judge's finding that P. W. 5 has spoken a falsehood cannot and ought not to be supported. But the question still remains, does the evidence of this witness go far enough to show that there was an undervaluation? If his evidence be carefully read, the point emerges that what was then contemplated was not a direct purchase by the Andhra Zamindar. The proposal seems to be that the purchase was to be made at the auction by the Dewan for the decree-holders

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Venkatasubba Rao, J.

and that he was in his turn to sell one of the lots to the Andhra Zamindar. Thus the sale that was contemplated was to be contingent upon certain events, and, as the evidence shows, it was not to be even for cash. The Andhra Zamindar, connected as he was with the judgment-debtors, would be prepared to pay a price, which the property would not fetch in the open market; to him it had a value which it might not have to others. The Dewan of Jeypore was well aware of that fact, and might well have tried to make what profit he could for the mortgagee. We cannot also overlook the fact that the Andhra Zamindar was not in a position to then and there complete the purchase. It would not be very safe to act upon the statement of the Dewan of Jeypore as representing his considered opinion as to the price of the property. Although the appellants' learned Counsel was entitled to comment and comment strongly on the fact that the Dewan of Jeypore did not venture to go into the witness-box and contradict P. W. 5, I am not prepared to infer from this omission that the statement as to the price in the proclamation was an under-estimate.

This finding would be enough to dispose of these appeals. But I cannot help adverting to certain irregularities in the conduct of the sale brought to our notice in the course of the hearing. In the Lower Court several objections were taken by the judgment-debtors, but it is regrettable that a most patent irregularity that occurred has not been noticed. The sale was ordered to be made in two lots, each lot comprising several villages. The proclamation was published in the usual way, and, as I have said, the sale was widely announced also in the leading newspapers. But the decree-holders affixed proclamations of sale in each village, and the fact has now come to light that what was described in each copy as the subject of the sale was the particular village at which that copy was posted and not the lot of which that village was but a part. That it is a material irregularity within the rule, admits in my opinion of no doubt. If I was satisfied that the judgment-debtors have sustained substantial injury by reason of this irregularity, I should without doubt have set aside the sale. I think it necessary in this connection to notice one contention put forward by the learned Advocate-General. It is argued that only by *direct as opposed to circumstantial evidence* an applicant under O. 21, R. 90 can show that the injury is the result of the irregularity. This

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contention does not require serious notice. He has cited cases which cannot be held to be authorities on the interpretation of the rule as it now stands. As a matter of fact those very cases, I presume, have led to an important amendment of the rule by the Legislature. In the view I have taken, this question of law does not assume any importance, but I have been obliged to refer to it on account of the contention put forward by the learned Advocate-General. As I pointed out in the course of the arguments, if the property to be sold is 1000 acres of valuable wet land, say in the Godavari delta tract, and the proclamation describes it as dry land, would any Court insist upon direct evidence for proving that the injury is the result of this irregularity? Or again, as has happened in one of the cases to which our attention has been drawn, if a sale announced to take place at 11 o'clock is held at 7, can nothing short of direct oral evidence satisfy the Court that the loss is due to that patent and obvious irregularity? It is unnecessary, as I have said, in the view I have taken to pursue this matter.

There remains another argument to which I must now advert. Mr. Ramanatha Shenai complains against the manner in which the sale was conducted. I must observe that the learned Judge attended to several matters in connection with the sale with great care, but allowed the sale to spread over a long period; in fact he made an order as I have said, that the sale was to continue from day to day from the 27th June to the 31st July. Mr. Ramanatha Shenai contends that it is wrong to fix a date for the terminating of the sale. I entirely agree. It is not only proper, but necessary, to fix the time when the sale is to commence; but what possible purpose can be served by fixing in advance the time when the sale is to come to an end? The person or authority in control of the sale must be free to decide, as the person most competent to do so, when the sale is to terminate. This fixing of time for bringing the sale to an end is allied to the pernicious system, to which I have adverted, that of directing the sale to be conducted from day to day. A sale by auction fundamentally differs from a sale by private contract. In a private sale negotiations move slowly, the parties consult and deliberate at leisure; but in the case of an auction-sale, investigations are made and inquiries are pursued beforehand; at the moment of the auction, the various bids offered in quick succession are intended to stimulate

competition, and rapid decisions have to be made, and are made, on the spot. If the sale is lengthened out (in this case the duration was over a month) the bidders, who are diligent enough to attend on the first day, may not care to attend on the second, and may never dream of waiting till the last; and the very object of adopting this method of sale would be completely defeated. Moreover, what prevents a person, who has made under the stimulus of competition a good bid, from holding himself not bound by it when he finds that the sale is protracted and prolonged? It is not my intention to lay down at once that the conducting of a sale in this manner necessarily amounts to a material irregularity, but I must most strongly condemn and deprecate the practice that has grown up.

Lastly, I am not prepared to believe that the Andhra Zamindar came to the Court on the 31st July after 5 P. M. with a *bona fide* desire to purchase the property.

In the result, the appeals fail and are dismissed. Ordinarily I should direct the unsuccessful party to pay the costs, but in this case to mark my disapproval of the manner in which the case was conducted for the decree-holders, I deprive them of costs. Each party shall therefore bear his own costs.

Reilly, J.

Reilly, J.—I agree with the result at which my learned brother has arrived, though I have reached it perhaps by a slightly different road.

In the first place I should like to say that I agree with what my learned brother has said about the extraordinary prolongation of this sale, which began on the 27th June, 1928, and was closed on the 31st July of that year, being continued from day to day. That appears to me to be a very bad and unbusinesslike way of conducting a Court-auction; and it is not the intention, I think, of the Code of Civil Procedure that an auction should be so conducted. There are many obvious disadvantages in such a method of conducting an auction. Bidders may come at the beginning, as my learned brother has pointed out, and may go away in despair; they cannot wait for weeks. They may change their minds. Some, who have money at the beginning of the auction, may not have money at the end. Nobody at first considers the matter at all as serious: there is plenty of time, and intending bidders need not make up their minds what they are going to bid. I agree that a Court-auction should not be conducted in that way. But in this case I understand that no complaint

has been made by the Judgment-debtors on the ground of the extraordinary extension of the sale. Their complaint, as put before us, has been rather that it was not extended a little longer. In the circumstances I do not think we can say that the sale is vitiated by the length of time over which it was spread in this case. At any rate we cannot come to such a conclusion in favour of the Judgment-debtors.

But it has been urged before us that these two estates, which were put up for auction, were eventually sold much below their real value, that they were very much undervalued in the sale proclamation and that thereby substantial loss was caused to the Judgment-debtors.

[His Lordship discussed the evidence and concluded:]

I think we must take it therefore that on the evidence there was an undervaluation of each of these estates in the sale proclamation and a considerable undervaluation.

Does it follow that the sale is vitiated? I do not see any reason to suppose that there was fraud in the undervaluation. The District Judge did his best to arrive at a proper valuation of both the estates after hearing all the Judgment-debtors had to say. I do not see how fraud can be made out in that matter. But so seriously to undervalue property announced for sale in such a proclamation is undoubtedly an irregularity. Can we say that that irregularity led to the estates being sold for less than what they would otherwise have fetched in this case? That in my opinion the Judgment-debtors have been unable to make out. These estates were advertised for sale in Court-auction in a number of newspapers all over India. There were repeated publications in April, 1928. Those advertisements, which have been exhibited in the case, show that the estates were described sufficiently: it was stated that they were to be sold in two lots, one estate in each lot, and no valuation was given in the advertisements. Now, anybody who wished to bid for these estates or thought that it would perhaps be profitable for him to bid at the auction which was advertised, would have to make inquiries as to what the value of the estate was. I do not think it at all probable that people, who would be likely to bid for these estates, would pin their faith in any way to the value mentioned in the Court's proclamation. They would make, if they were sensible people at all, a very much

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more careful investigation than that; they would pursue their inquiries a great deal farther. They would inquire not only what was the rent to be obtained from the villages of the two estates but what prospects there were of developing the estates and what difficulties would be likely to face new proprietors, if they purchased them, and a great many other things, which could only be ascertained by local inquiry. There was ample time, as I have mentioned, for such an inquiry to be made; the sale was begun more than two months after it was advertised and it continued, according to the extraordinary procedure followed, for about 5 weeks. During that time everybody concerned had ample time to find out everything that could be found out about the estates. And I may mention that besides advertising the sale of these estates in newspapers a separate notice was sent to every Zamindar in the Presidency. Zamindars would no doubt be the people who would be most likely to bid at the sale, and they would certainly be the persons most likely to know what inquiries to make about the value of such estates and how to push those inquiries through. Although these estates were eventually sold in this auction for comparatively low prices Rs. 2,51,000 in each case, in the circumstances I am not at all satisfied that that was due to the unduly low values entered in the sale proclamation.

It has been suggested for the Judgment-debtors also that there was some fraud towards the close of the auction in regard to the Dewan of Andhra, who was somehow prevented by the Dewan of Jeypore from bidding more than 2¼ lakhs for each estate in accordance with his master's directions. There is really no evidence in support of that suggestion, and it is destroyed I think by the fact that the Dewan of Andhra was still in the service of the Zamindar of Andhra when this case was tried by the District Judge more than a year after the sale.

As my learned brother has pointed out, in the course of the hearing before us a very curious feature of the case was discovered, namely, that in every village in the two estates a proclamation in regard to the sale was put up in April or May, but that proclamation was inaccurate. We find from the specimen proclamations at which we have looked that what was put up in the villages in each case was a proclamation that the sale would be held for the decree debt. That was correct; but the property described as for sale in each of those proclamations

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was the village itself and nothing more. That would undoubtedly be misleading to anybody who paid any attention to it. It was a very curious and careless irregularity. But it has not been denied before us, and it has not been denied at any stage, that a proper proclamation, stating that each estate would be sold as a whole in one lot, was duly published in accordance with law; it was put up in the District Court-house, in the Collector's Office and in the proper place in each of the two estates. Although no doubt there was a proper proclamation made in accordance with all the prescribed rules in regard to the auction as it was actually held, that is to say, for the sale of each estate in one lot, there were these superfluous notices in the villages, notices which were both superfluous and inaccurate and would have misled anybody who had paid attention to them. But there is no evidence whatever that anybody, who was at all likely to be a bidder, ever imagined that the villages would be sold individually and not the estates in one lot each. And in the absence of any such evidence, we could not find, I think, that the publication of these superfluous and inaccurate notices, as indeed they were, in the villages had any effect upon the result of the sale. I do not wish it to be understood that the absence of direct evidence in such a case as this, that is, the evidence of some witness coming before the Court and saying that he was misled by such a notice as these which were published in the villages, would in all cases prevent a reasonable inference being drawn that by such an irregularity in the publication of the proclamations substantial loss had been caused to the Judgment-debtors. Whatever may have been declared in any decision to have been the law before what corresponded to R. 90, O. 21, Code of Civil Procedure, assumed its present form, certainly it is not necessary now to rule out reasonable inferences from evidence in order to establish that an irregularity in the conduct and publication of a sale has caused substantial loss. In this case however there is not only no direct evidence, but I see no sufficient ground for an inference that the result of these sales was affected by the inaccurate proclamations published in the villages. And, as I mentioned, the publication of these notices in the villages was discovered in this Court. The Judgment-debtors said nothing about it at any stage and felt no grievance on this account. Indeed it would be a proper objection, which their opponents

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might well raise, that the point was never taken by the Judgment-debtors in their petition to the District Court, that it was not taken in the grounds of appeal here, and that, unless it had been noticed by us accidentally during the course of the hearing of this appeal, the Judgment-debtors would have known nothing about it. There is no reason to interfere with the sales on that account.

There is one other matter to which Mr. Ramanatha Shenai referred as being of some importance. He objected to the eventual closing of this long-protracted sale at 5 P.M. on the 31st July, 1928. The Judge had ordered that the sale should be continued until the 31st July of that year. That was long enough. But it is suggested by Mr. Ramanatha Shenai that we ought not to understand the order that the sale was to continue till the 31st July as meaning that it should stop at the end of Court-hours on that day, but that it should have been continued until some unspecified hour in the night. I can see no basis whatever for any such suggestion. It is urged that the Zamindar of Andhra came to the Court-house after 5 P.M. on the 31st July anxious to make some belated bid for these estates. If he did intend to bid at that hour, he had nothing to complain of when he found that the sale had stopped, as it was obviously intended that it should stop, at the close of the Court-hours on the 31st July. The Judgment-debtors can have no reasonable grievance whatever in the fact that the sale at last came to an end when the working Court-hours for the 31st July ended.

In my opinion there were irregularities in this case and some very curious irregularities, but there is no sufficient reason why we should interfere with the decision of the District Judge. I agree that these appeals should be dismissed, and I agree also with the order which my learned brother has proposed as to costs.

B.V.V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN PANDALAI.

Chittoori Chinnammi .. *Appellant* in both the appeals (2nd Defendant)*

v.

Immanni Venkayamma and others .. *Respondents in both the appeals (Plaintiffs and defendants Nos. 1, 4, 5 and 6).*

Chinnammi *v.* Venkayamma.

Registration Act (XVI of 1908), Ss. 32 and 73 (1)—Minor claiming under document—Presentation for registration—Validity—Powers-of-Attorney Act (VII of 1882), S. 5—Hindu wife appointing her husband as attorney—Presentation of appeal by husband—Question as to minority of wife if material—Civil Procedure Code (V of 1908), O. 41, R. 27—Additional evidence—When can be allowed in appeal.

Where a minor married woman presented before a Sub-Registrar a relinquishment deed executed in her favour for registration and the Sub-Registrar having refused to register it, she executed a power-of-attorney in favour of her husband, who preferred an appeal to the Registrar and got the document registered,

Held, that the presentation by the minor claiming under the document sought to be registered before the Sub-Registrar was perfectly valid.

Venkatappayya v. *Venkataranga Row*, (1928) L. R. 56 I. A. 21: I. L. R. 52 Mad. 175: 56 M. L. J. 218 (P. C.), relied on.

Held further, that the power-of-attorney in favour of the husband was valid in law and he was competent to present the appeal to the Registrar whether the wife was a major or a minor on the date of the appeal. If she was a minor on that date the presentation of the appeal could also be supported on the ground that he acted as her lawful guardian under the Hindu Law.

Fresh evidence in an appeal can only be taken if the Judge on an examination of the record discovers some lacuna which makes it necessary for him in the exercise of his duty to decide the case to get some more evidence. It is not the right of the parties; it can be exercised only by the Judge and that exercise is hedged in by the requirement that "grounds" must be stated.

Appeals against the order and decree of the District Court of East Godavari in A. S. No. 205 of 1926 preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 22 of 1923.

A. Lakshmayya for appellant.

M. Appalacharya for 1st respondent.

The Court delivered the following

JUDGMENT.—Both these appeals are from the same order and raise the same question, namely, the validity of the regis-

*A. A. O. No. 59 of 1931 and S. A. No. 434 of 1932. — 2nd November, 1932.

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tration of a document, Exhibit I, dated the 17th of March, 1921, purporting to be a relinquishment by the plaintiff and 1st defendant, the two elder sisters, in favour of the 2nd defendant, the youngest sister, of a mortgage right taken in the names of all the three. The question arose in a partition suit brought by the plaintiff against her two sisters of their father's property. It is not relevant to this appeal to mention the other disputes in that suit. It is sufficient to say that the appeal to the lower appellate Court was brought by the plaintiff concerning two points, the first relating to the question whether she was entitled to the benefit of a legacy given to her under her father's will which the defendants said had been redeemed by a subsequent gift. This was decided by both the Lower Courts against the plaintiff. The other point in dispute in appeal was about Exhibit I. The Court of first instance held that the plaintiff and the 1st defendant who had executed the relinquishment were bound by it and that the objections raised by the plaintiff on the ground (1) that it was brought about by fraud and misrepresentation, and (2) that its registration was invalid because the presentation of the document before the Sub-Registrar and of the appeal before the Registrar were invalid according to the Registration Act, are not well founded.

In appeal the learned District Judge upheld the first Court's finding as to fraud and misrepresentation affecting Exhibit I but differed from the first Court in its opinion about the validity of its registration. He held first, though not without hesitation, that the presentation of the document by the 2nd defendant (the present appellant) before the Sub-Registrar might be valid although she was a minor at the time, but secondly that the presentation of the appeal from the order refusing registration to the Registrar was invalid because it was made three days after the 2nd defendant had attained majority and that the appeal was filed by her husband purporting to act as guardian when in fact his authority as guardian had ceased. On this ground the learned Judge held the registration of Exhibit I invalid and therefore the document itself inoperative and sent the case down to enable the plaintiff to get her proper share of the mortgage right which still belonged to her.

In these appeals the only question which has been argued is the last mentioned one relating to the validity of the registration of Exhibit I.

On this point it is clear that the facts on which the lower appellate Court held the registration invalid were quite different from those on which the first Court held it valid. In the first Court and so far as appears from the records after the plaintiff had filed her memorandum of appeal the validity of the registration was attacked on the basis that the appellant (the 2nd defendant) was throughout a minor and the case made was that a minor was incompetent to present a document for registration in her favour to the Sub-Registrar and as a minor has no power to appoint an attorney the husband acting as a holder of such power was incompetent to present the appeal. From the judgment in appeal however it is clear that the learned Judge adopted quite a distinct ground. He held that the 2nd defendant had attained majority on the 31st August, 1903, but as the appeal to the Registrar was filed on the 3rd of September, 1921, she was on the latter date a major. Therefrom he concluded that though if she had been a minor her husband as guardian might have validly presented the appeal, yet as she had ceased to be a minor, the guardianship also ceased with it and his authority to act on behalf of his wife; and as for the power of attorney he held that his minor wife had no authority to execute a power during her minority. Both grounds of representation thus having disappeared he held that the appeal was filed by an incompetent person.

The learned Judge has fallen into more than one error in thus dealing with the point. The finding that the appellant (the 2nd defendant) had attained majority three days before the appeal was filed was a point not raised by any of the parties. It was not raised in the first Court and so far as appears it was not raised in the lower appellate Court. I have examined the grounds of appeal to the Lower Court and do not find any such ground taken in it. The only ground taken in the appeal grounds is that the 2nd defendant's husband filed the appeal not as guardian, in which case it would be saved on the footing that his wife was a minor, but as her agent. (Ground No. 13.) To sustain this ground apparently the appellant in the Lower Court (the plaintiff) was allowed to produce a new document, Ex. P, which showed that the 2nd defendant's husband had filed the appeal as agent. Now this document which was obviously filed to sustain Ground No. 13 in the memorandum of appeal was used by the learned Judge for an entirely

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different purpose. Having upon Ex. G series found that the date of birth of the 2nd defendant was the 31st August, 1903, and that the date of the appeal was the 3rd September, he put two and two together and concluded that the 2nd defendant had attained majority three days before the appeal. The whole of the rest of the learned Judge's judgment is built upon this. In my opinion the learned Judge was not justified in introducing a new ground of fact by way of objection to the registration of Ex. I which had not been taken by the parties and which so far as the 2nd defendant was concerned must have taken her entirely by surprise at a time when it was absolutely impossible to meet it. But quite apart from that the whole of this argument is derived from the document, Ex. P, which the learned Judge had no jurisdiction to admit. It is now settled beyond possibility of controversy that fresh evidence in an appeal can only be taken if the Judge on an examination of the record discovers some lacuna which makes it necessary for him in the exercise of his duty to decide the case to get some more evidence. It is not a right of the parties; it can be exercised only by the Judge and that exercise is hedged in by the requirement that "grounds" must be stated. None of these precautions seems to have been adopted before Ex. P was admitted in this appeal. I have therefore come to the conclusion after hearing the respondents' learned Advocate upon the point that Ex. P must be struck out of the record and if that goes the whole of the foundation upon which the structure of the learned Judge's judgment is built disappears.

Though these appeals ought to be decided upon the footing that the 2nd defendant was a minor on both dates, namely, the date of presentation of the document before the Sub-Registrar and of the appeal before the Registrar, it will appear from what follows that it would not affect the result even if she had attained majority before the date of this appeal. It is admitted that the 2nd defendant herself, then a minor, presented the document before the Sub-Registrar and the plaintiff, her elder sister, appeared and denied execution. The Sub-Registrar thereupon refused registration. There can be no question in view of the authorities that presentation by a minor claiming under a document in her favour for the purpose of registration before a Sub-Registrar is perfectly valid. In *Rajah Keesara*

Venkatappayya v. *Rajah Nayani Venkata Ranga Row*[1] power to adopt a minor aged 14 was in question. The document was presented for registration by his natural father, and the question was whether that was valid presentation. In the course of the argument, two of the learned Lords of the Privy Council made observations which leave the matter no longer in doubt. At p. 222 Lord Phillimore during the argument of Mr. Dunne put it to him that in the case then under appeal the adopted boy could present (the document) and at p. 224 Lord Atkin said the same thing in these words: "If they had then objected the adopted son could have been produced to present the document and the defect could have been cured at once."

There is a direct decision of a single Judge in the late Chief Court of Rangoon reported in *Chetty Firm* v. *Ma On Shwe*[2]. There is no decision to the contrary and therefore so far as the presentation to the Sub-Registrar was concerned, Ex. I was validly presented.

Then as regards the appeal the learned Judge was in error in thinking that the language used in S. 73 (1) and S. 32 is exactly the same and that the principles which apply to the first presentation of a document under S. 32 must also apply to the presentation of an application under S. 73 (1). The language of the two sections is not the same. All that is similar is that the class of persons who are empowered to make the application under S. 73 (1) are included in those who may present a document under S. 32. But they are not identical. Secondly, there is no question of presentation at all under S. 73. All that S. 73 requires is making an application and as far as I can see there is no reason why, if the Registrar is satisfied that the person making the application is entitled to do so, the application should not be made in any way which is satisfactory to him. It may no doubt be presented in person but I do not see why it should not be sent by post. However, that is not the material point. It is admitted that the application under S. 73 was made by the 2nd defendant's husband on her behalf and styling himself as agent under a power-of-attorney. As to this the

1. (1928) L. R. 56 I. A. 21: I. L. R. 52 Mad. 175: 56 M. L. J. 218 (P. C.).
2. (1916) 33 I. C. 33.

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learned Judge seems to have thought that the application was incompetent because the power-of-attorney by the 2nd defendant during her minority was itself inoperative. By S. 5 of the Powers-of-Attorney Act (VII of 1882) a married woman, whether a minor or not, shall, by virtue of this Act, have power, as if she were unmarried and of full age, by a non-testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do. The words of this section are perfectly general and I have not been shown that there is anything which limits the generality of those words. It is no doubt the case that by S. 183 of the Contract Act any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. But as the words of S. 5 of the Powers-of-Attorney Act show, by virtue of that Act minor married women are empowered to appoint attorneys on their behalf to execute such documents and do such acts as they are competent to execute or do. In this case the presentation of an application by way of appeal to the Registrar was undoubtedly an act which the 2nd defendant might have herself done and therefore by the section above referred to her attorney lawfully appointed was capable of doing that act on her behalf whether she was a minor or a major at the time of doing it. It is not disputed that the power-of-attorney falls within S. 33 of the Registration Act. The presentation of the application to the Registrar was thus perfectly valid whether the 2nd defendant was a minor or had attained majority on the date of the appeal. If she was still a minor the same result is arrived at in another manner. The 2nd defendant's husband whether empowered under the power-of-attorney or not was himself the husband and according to Hindu Law the lawful guardian of his minor wife. As such he comes within the description of representative of the claimant who was himself competent to make the application On these grounds the application to the Registrar was valid.

The result is that the opinion of the learned District Judge as to the registration of Ex. I cannot be upheld. It is admitted that the consequence of that is that the plaintiff's appeal to the lower appellate Court will stand dismissed. The appellant (2nd defendant) must have her costs from the plaintiff in

C. M. A. No. 59 of 1931. There will be no order as to costs in the Second Appeal.

B. V. V. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD WRIGHT, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Raja Mohan and others .. *Appellants**

v.

Nisar Ahmad Khan and another .. *Respondents.*

Oudh Estates Act (1869), S. 8—List Second—Trusts and equitable obligations enforceable as against registered taluqdar—Non-taluqdari property—Family custom of descent to a single heir—Presumption of.

The Oudh Estates Act, 1869, does not divest rights which had already been granted by the Government before the passing of the Act. *Mohammad Abdussamad* v. *Kurban Husain*, (1903) L. R. 31 I. A. 30: I. L. R. 26 All. 119 (P.C.), relied on.

The Act confers on the registered taluqdar the absolute legal title as against the State and against adverse claimants to the taluqdari, but it does not relieve the taluqdar from any equitable rights and obligations, to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. Where trusts or equitable obligations of this character (*e. g.*, in the nature of a family arrangement) are established, they would be binding upon and enforceable as against the registered taluqdar. *Mt. Thukrain Sookraj* v. *Government*, (1871) 14 M. I. A. 112 and *Hasan Jafar* v. *Muhammad Askari*, (1899) L. R. 26 I. A. 229: I. L. R. 26 Cal. 879 (P. C.), followed.

On the death of a taluqdar, whose name is entered, under S. 8, in List Second (" A list of the taluqdars whose estates, according to the custom of the family on and before the 13th February, 1856, ordinarily devolved upon a single heir") there is a rebuttable presumption of a family custom that property outside the taluqdari estate descends in the same way as the taluqa, namely, to a single heir. *Murtaza Husain Khan* v. *Muhammad Yasin Ali Khan*, (1916) L.R. 43 I.A. 269: I. L. R. 38 All. 552: 31 M. L. J. 804 (P. C.), referred to.

Consolidated Appeals No. 107 of 1930, from two decrees of the Chief Court of Oudh, dated the 15th October, 1929, which affirmed on appeal two decrees of a single Judge of that Court sitting as a Court of Original Jurisdiction, dated the 8th October, 1928.

The questions involved in the appeal were: (1) Whether succession to the properties left by Ewaz Ali Khan, taluqdar of Mahona, and by his son, Dost Mohammad Khan, was governed by S. 22 of the Oudh Estates Act, 1869; (2) Whether the Mahona

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*P. C. Appeal No. 107 of 1930. 12th January, 1933.
Oudh Appeal Nos. 1 and 2 of 1930.

P. C.

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estate was an estate descending by custom to a single heir; and (3) Whether there was any presumption in favour of such a custom.

The facts of the case are fully set out in the Board's judgment.

Dunne, *K. C.* and *Narasimham* for appellants.

De Gruyther, *K. C.* and *Wallach* for respondents.

12th January, 1933. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—These are consolidated appeals from two decrees of the Chief Court of Oudh, dated the 15th October, 1929, which affirmed two decrees of a single Judge of that Court, dated the 8th October, 1928, passed on suits Nos. 1 and 2 of 1928 respectively. The main point for decision in the appeals is whether appellants (plaintiffs) Nos. 2 to 8 were entitled to succeed as Sunni Mohammadans to a share in the property left by Mohammad Ewaz Ali Khan, taluqdar of Mahona, who died on the 24th July, 1915. Appellant No. 1 who had a financial interest in the property and was financing the action may be disregarded herein as his claim was not pressed in this appeal, having been rejected by the Courts below. Respondent No. 1, who alone appeared on the appeal, claims the property as having descended to him as single heir of Ewaz Ali, either in virtue of Act No. I of 1869 or according to family custom.

The relationship between the parties is shown in the following pedigree*:—

Suit No. 1 related to the property left by Dost Mohammad on his death in 1917; Suit No. 2 related to the entire property left by Ewaz Ali on his death in 1915; the appellants claimed in their respective proportions a three-fifths share in the latter property and a one-fourth share in the former.

The estate in question was known as the Mahona estate and had been for some generations in the family of Raja Ali Bakhsh Khan; he was killed after the end of the Mutiny in November, 1858. The Government were then proceeding with the second summary settlement of the entire land of Oudh which they had annexed, and they were inviting applications from the existing proprietors. Shortly after her husband's death, the widow, Rani Sadha Bibi, executed the form of application Form A: on that form the names of the Malguzars were stated to be those of herself, Jamshed Ali and Ewaz Ali. The

* See next page.

FAZLE ALI KHAN.

- Raja Ali Bakhsh Khan (died in 1857, married Rani Sadha Bibi, who died on 29th August, 1873).
- Ali Mardan Khan (predeceased Ali Bakhsh).
  - Nabi Bakhsh (predeceased Ali Bakhsh).
    - Zenatun Nisan (died July, 1913).
- Rajab Ali (died issueless).
- Ahmed Bakhsh Khan (married Hubba Bibi).
  - Raja Jamshed Ali Khan (died on 11th December, 1876).
  - Raja Ewaz Ali (died on 24th July, 1915).
    - Yar Mohammad Khan (died on 31st January, 1924).
      - Nisar Ahmad (Defendant No. 1).
      - Ahmed Yar Khan (died on 5th December, 1924).
        - Ishtiyaq Ahmed Khan (Defendant No. 2).
    - Dost Mohammad (died on 29th March, 1917).
    - Mohammad Mustafa (died on 30th October, 1920).
      - Badar-ud-duja (Plaintiff No. 3).
    - Bashir-ud-din (Plaintiff No. 2).
    - Iltifat Ahmad (died on 10th November, 1921).
      - Five sons, who are Plaintiffs Nos. 4-8.

Rani stated that the estate was a Raj, without pattidars or co-sharers, and ancestral property, having been long in the possession of the family. She claimed the settlement with herself on the ground that she was the owner, in her husband's place; she stated that the two nephews lived with her and under her control; she asked that Ewaz Ali should succeed her as owner. This application appears to have been provisionally granted, but on the 15th March, 1859, it was ordered by the settlement authorities that the settlement should be with the Rani and the two nephews jointly and a patta be granted accordingly. On the same day the patta was granted in the names of all three and a kabuliyat was executed by all three. The summary settlement was originally temporary in character, being limited to three years, but as the taluqdars

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were apprehensive that their tenure might be uncertain and it was desired to dispel these fears, a letter was published by the Government of India declaring that "every taluqdar with whom a summary settlement has been made since the re-occupation of the Province, has thereby acquired a permanent hereditary and transferable proprietary right, namely, in the taluqa for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluqa." The letter went on to provide for the preparation of a list of taluqdars upon whom a proprietary right had thus been conferred and for the preparation of sanads to be issued to them. This letter constituted an act binding on the Government and as applied to the persons in question here, constituted the Rani and her two nephews, tenants-in-common of the taluqa and a sanad ought to have been issued to them accordingly. But in fact when the sanad for the taluqa was issued on the 11th April, 1862, it was in the name of the Rani alone, and when lists were prepared under the Act No. I of 1869, the name inserted was that of the Rani alone in Lists I and II as the taluqdar. The main contention in this case has been that the succession to the property was governed by the Act, that is, that the Rani was taluqdar of the estate, and that the succession as under List II was that of devolution upon a single heir: hence, it was claimed that Jamshed Ali as single heir succeeded his aunt in 1873, then he was succeeded, as he had no issue, by his only brother Ewaz Ali as heir, on whose death in 1915 the estate passed to his eldest son as heir, and finally to the latter's eldest son, the 1st respondent. The appellants contended that the estate was outside the Act altogether, and hence they were entitled to succeed in accordance with the Sunni Mohammadan law both in respect of the estate possessed by Ewaz Ali at his death and also in respect of that portion of the estate which before his death he had transferred to his second son Dost Mohammad; before their Lordships the former item was modified and it was admitted that one-third portion of the Mahona estate was within the Act as being the property of the Rani under the settlement, she being the registered taluqdar in respect of that share; the claim was therefore limited to the two-thirds portion which was outside the Act. The 1st respondent while claiming that the whole estate was within the Act and that the Rani was the registered taluqdar,

alternatively claimed that by the custom of the family, succession was on the basis of single heirship and hence that in any case the estate of Ewaz Ali descended as he claims. Both the single Judge and the Chief Court in appeal have decided in favour of that latter contention. A question was raised whether the relevant custom of the family was that of the family of the Rani's father or that of her husband. But her sole claim was to her husband's estate as representing his family, and whatever grant was made to her by the Government was on that basis: all such grants were made by the Government as of lands which the Government had annexed as absolute owners, and though in the main the grants were made to former proprietors, the grantees held solely under the new title given by the Government. Their Lordships think that the Courts below were right in holding that the relevant custom, if material to be considered, was that of the Rani's husband's family. It is immaterial whether the nephews are to be regarded as her husband's heirs or her own since as both Courts have held, they were not only his, but also her heirs, being the sons of her own sister and nearest surviving relatives.

It is necessary to trace as shortly and in as summary a form as possible the material events subsequent to the Government's letter of the 10th October, 1859, whereby as at that stage the estate was jointly vested in the three persons as taluqdars, and to ascertain by what circumstances and with what consequences it came about that not only was the sanad granted to the Rani alone, but she alone was registered as taluqdar under Act I of 1869. The history has been examined with great care and completeness in the Courts below, especially by the Chief Judge, and may be summarised here. The Rani, as she had claimed at the outset to be owner of the estate, still persisted in that claim and resisted any attempt by her nephews, who were 24 and 21 years old respectively, to assert their rights or to acquire a share in the management or control. The settlement authorities seem from time to time to have been perplexed as to the position; at some periods they proceeded on the basis that all three persons were taluqdars, and at other times they treated the Rani as sole taluqdar, subject to her providing due maintenance for her nephews and guaranteeing their succession as heirs. But on the 23rd August, 1861, all three parties came to an arrangement, eventually sanctioned by

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the Government, under which the Rani was to pay the nephews Rs. 1,200 a year and put them in possession of certain land as sir. On the basis, as it seems to their Lordships, of that arrangement the sanad was granted to the Rani in her sole name: it was dated the 8th April, 1862. The Rani remained in possession though various disputes and contentions arose between her and her nephews between that date and the date of making up the lists under the Act I of 1869. No more than a reference to certain crucial matters during that period need here be made. Thus in 1864, the nephews were claiming to have the management taken away from the Rani but without success. Then in 1868 comes a very important document, a deed of the Rani, dated the 28th April, 1868, registered at Lucknow, in which describing herself as taluqdar of Mahona she agreed that if the estate were left undivided in her possession as it was settled with her in the late summary settlement under the Government sanad in her name alone, she would never alienate the estate by will or otherwise during her lifetime and after her death the estate should remain in force with the nearest male heir or heirs as it might be decided. When the Act No. I of 1869 was passed and it became necessary to draw up the lists, the settlement authorities were in some doubt how to deal with the question of the Mahona estate. The authorities seem to have heard all the three parties who appeared before them, and it was eventually recorded on the file that a settlement of the disputes had been arrived at, so that the parties were all of one mind and that before entering the Rani's name under List I under the Act, the succession of the nephews had been provided for. In fact the Rani's name was entered in respect of the Mahona estate in List I and List II, and she continued in full possession till her death on the 27th August, 1873. When that happened, Jamshed Ali Khan applied for possession but his claim was contested by the younger brother, Ewaz Khan, on the ground that Jamshed Ali had agreed to give way to his brother: the dispute, however, was compromised on the terms that Jamshed Ali should have possession for life but without power to alienate, on condition of making certain allowances to Ewaz Ali, who was to have in remainder a life estate, which was to become an absolute estate in the event of Jamshed Ali dying without issue but Ewaz Ali leaving issue. These events in fact happened. On the

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1st February, 1875, Jamshed Ali was entered as taluqdar of Mahona in succession to the Rani. Jamshed Ali died on the 11th December, 1876, and Ewaz Ali was duly entered as succeeding, as he in fact did, to the taluqa. He died on the 24th July, 1915, and was succeeded by his eldest son Yar Mohammad Khan who died on the 31st January, 1924, and was in turn succeeded by his eldest son, Nisar Ahmad Khan, the 1st respondent herein. In July, 1927, the suits Nos. 1 and 2 were commenced.

The numerous cases already decided by this Board in regard to the Oudh settlement do not afford any complete parallel to the problems raised in the present appeal. Act No. I of 1869 defines a taluqdar as any person whose name was entered in the first of the lists mentioned in S. 8 of the Act: the Rani's name was so entered. S. 10 provides that no persons should be considered taluqdars, except persons so entered and that the entry should be conclusive evidence of the fact. Hence the Rani must be considered as having been a taluqdar under the Act. S. 3 provided that every taluqdar with whom a summary settlement of the Government revenue was made between the 1st April, 1858, and the 10th October, 1859, and[1] to whom before the passing of the Act, and subsequently to the 1st April, 1858, a taluqdari sanad had been granted should be deemed to have thereby acquired a permanent heritable and transferable right in the estate named in the list attached to the agreement or kabuliyat executed by such taluqdar when such settlement was made. The Rani fulfilled all these requirements, but the appellants rely on the fact that the summary settlement was made with her not as sole proprietor but as proprietor jointly with the two nephews: hence they claim that her rights were limited to that third which they now admit, though they previously denied, became vested in her in accordance with the Act: as to the remaining two-thirds interest in the estate they claim that that interest never fell within the Act at all, but was and remained the property of the nephews under the summary settlement as confirmed by the Government's letter of the 10th October, 1859, so that its descent was never affected by the statutory rules prescribed in S. 22 of the Act or by the statutory presumption based on the placing of the estate in list II

1. or ?—K. J. R.

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under S. 8, read with S. 10 of the Act. They claim that the rights so vested in the nephews could not be affected by the fact that the sanad was issued in respect of the whole estate in the name of the Rani alone, or by the fact that her name alone was entered in the lists under the Act. They contend that the sanad could not cancel rights already conferred by the Government and that the Act could not divest rights which had already been granted before it was passed. The latter contention, stated in the abstract, cannot be controverted: the principle is clearly laid down by the Board, though in regard to very different facts, in the case of *Mohammad Abdussamad* v. *Kurban Husain*[1], though even in that case it had to be considered whether, in Lord Lindley's words, there had been "some family arrangement to the effect that the entries in question (that is in the statutory lists) should have been made and that the succession should be changed." What the 1st respondent contends is that in the present case there was a family arrangement between the Rani and the two nephews, to the effect that notwithstanding the terms of the settlement of 1859, the sanad should be granted to her as sole owner and she alone should be entered in the lists under the Act as taluqdar on condition that she should not in her lifetime alienate the estate but leave it to descend to her nephews as her heirs under the Act and meantime in her lifetime pay them maintenance. It was on this basis, the 1st respondent contends, that the sanad was granted to the Rani alone, and her name alone was entered in the statutory lists. Their Lordships are of opinion that this contention, as an inference of fact, is justified by the history of the events summarised in the earlier portion of this opinion. The legal position thereby constituted may, their Lordships think, be shortly stated to be that the full title conferred by the sanad and the entry in the statutory lists became vested in the Rani, but subject to the obligation under which she held that title, and in consideration of which the nephews withdrew their opposition and the Government did what otherwise they certainly would not have done, that is, granted the sanad and made the statutory entry in a form which was inconsistent with the summary settlement. It is not necessary to determine whether the obligation so assumed by the Rani is to

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1. (1903) L.R. 31 I. A. 30: I. L. R. 26 A. 119 (P.C.).

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be deemed to constitute a declaration of trust or a covenant. It was, as their Lordships think, acted upon by the nephews and was binding on the Rani. The title conferred under the Act did indeed give the registered taluqdar the absolute legal title as against the State and adverse claimants to the taluqa, but it did not relieve the taluqdar of any equitable obligations, to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. Numerous decisions of this Board have recognised and enforced as against a registered taluqdar trusts or obligations of this character: as instances reference may be made to such authorities as *Thukrain Sookraj* v. *Government*[1] and *Hasan Jafar* v. *Muhammad Askari*[2]. The latter case shows that such a trust may be constituted by the undertaking or agreement of the grantee together with the fact that it was on such agreement or undertaking that the Government made the grant: as Lord Macnaghten said at p. 233:

"Whatever Karam Ali took under the summary settlement and the sanad which followed it he took as a gift from the Government. It was, of course, competent for the Government when making the gift to impose upon the recipient of their bounty any terms they pleased not inconsistent with the law. If the intention of the Government is clear, it cannot make the least difference whether the terms were imposed by the Government of its own motion, or suggested by the grantee and assented to by the Government."

There the sole grantee had given assurance that he would admit his former co-sharers and he was held to be a trustee accordingly. In the present case, in their Lordships' opinion, the Government made their final grant on the terms of the Rani's registered deed of the 28th April, 1868, and she was bound accordingly. Indeed she never disputed that. In this case, however, the real difficulty is that the grant to the Rani alone constituted by the sanad and entries in the lists under the Act of 1869 conflicted with the title conferred under the letter of the 10th October, 1859. According to that latter title the Rani was co-sharer with her two nephews; the case therefore differs from the cases previously decided where consistently throughout the grant has been to the single donee who has then been held bound by a trust in favour of the co-sharers in their due shares. Such a case was *Kedar Nath* v. *Ratan Singh*[3]. The converse case of a discrepancy between the title under the summary settlement and that under the sanad and Act of 1869

1. (1871) 14 Moo. I. A. 112.
2. (1899) L.R. 26 I. A. 229: I. L. R. 26 C. 879 (P.C.).
3. (1910) L. R. 37 I. A. 161: I. L. R. 32 A. 415: 20 M. L. J. 900 (P.C.).

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is afforded by the authority already cited herein of *Mohammad Abdussamad* v. *Kurban Husain*[1]: it was held on the facts of that case that entries in the lists of Act I of 1869 had not changed the succession, which depended on the settlement of 1859, but Lord Lindley, as already noted in this opinion, was prepared to contemplate that the entries would have changed the succession if made in accordance with a family arrangement to that effect. This is exactly what the 1st respondent contends has happened in this case. Indeed, from the standpoint of the co-sharers it does not appear to make any practical difference whether the family arrangement was made before the summary settlement or after the summary settlement but before the grant of the sanad or the making of the entries under the Act, though no doubt it is material from the standpoint of the Government, who would not change from the terms of the summary settlement of 1859 unless convinced that a relevant family arrangement had been arrived at. In the present case, as their Lordships have already explained, the Government were convinced of that fact at the two crucial epochs, that is on the issue of the sanad and the making of the entries under the Act, though it is true that in the various intervening disputes and discussions there were periods when occasional confusion and uncertainty existed in the minds of the settlement authorities.

On the whole their Lordships conclude that the settlement of 1859 was duly varied in accordance with a family arrangement and the effect of the sanad of 1862 and of entry in the lists under the Act No. I of 1869 was to vest the whole estate in the Rani as taluqdar under the conditions of the Act, though subject to beneficial rights in the nephews to receive from her the agreed maintenance and to succeed to the estate in the agreed order of succession, and to be guaranteed that she would not alienate the estate. All this was duly carried out and when the estate came to Ewaz Ali the beneficial rights had become merged and had expired and the absolute title, both legal and equitable, vested in him as taluqdar under the Act with succession to a single heir. In due course the respondent succeeded as single heir to his father. It follows that the claim of the appellants fails in regard to Suit No. 2. The same result follows in Suit No. 1. The property there in question was part

1. (1903) L.R. 31 I. A. 30: I. L. R. 26 A. 119 (P.C.).

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of the taluqdari estate and was transferred by Ewaz Ali when taluqdar to his younger son Dost Mahommad. When the latter died, the property followed the same line of devolution to a single heir under S. 14 of Act I of 1869 as amended by the United Provinces Act III of 1910, and thus in due course became vested in the respondent.

This conclusion renders it unnecessary to consider the alternative case set up by the 1st respondent, *viz.*, that if he failed in his contention that the succession was governed by the Act he was still entitled to claim the same rights as heir on the ground of the custom of the family. Their Lordships will only say that if, contrary to their opinion, Act No. 1 does not govern the succession they are in full accord with the reasoning of the Chief Judge that the respondent has established a custom of the family of descent to a single heir. Their Lordships need not repeat the Chief Judge's careful analysis of the evidence which, in their opinion, is sufficient to establish the custom quite apart from the presumption given effect to by the Board in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[1] that on the death of a taluqdar, property outside the taluqdari estate descends in the same way as the taluqa, in this case to a single heir under List II. On any view Ewaz Ali must have been deemed, if their Lordships had accepted the appellants' main contention, to have been a registered taluqdar, holding as taluqdari estate the one-third share of Mahona, of which in that view the Rani was registered taluqdar, and hence the presumption would apply to the residue of the property which he possessed on her death. It is true that this presumption is rebuttable, but the appellants called no evidence to rebut it. The custom would apply to the property which was the subject of Suit No. 1.

In the result, their Lordships are of opinion that the appeal fails on all points, and should be dismissed with costs, the decrees of the Chief Court of Oudh being affirmed.

They will humbly so advise His Majesty.

Solicitor for appellants: *Harold Shephard.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

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1. (1916) L. R. 43 I. A. 269: I. L. R. 38 A. 552: 31 M. L. J. 804 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD WRIGHT, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Dwarkanath Varma and Gaya Prasad .. *Appellants**

v.

The King-Emperor .. *Respondent.*

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Dwarkanath Varma *v.* The King-Emperor.

Criminal Procedure Code (V of 1898), Ss. 4 (1) (A), 194 and 342—Letters Patent, Patna, clause 17—Ex-officio information exhibited by Government Advocate—Contents of—Criminal appeal to Privy Council—Convictions quashed—Serious miscarriage of justice.

Semble: The High Court, Patna, has jurisdiction to try persons against whom the Government Advocate, with the previous sanction of the Local Government, has exhibited an ex-officio information (*vide* clause 17 of the Letters Patent, Patna, and S. 194 of the Criminal Procedure Code, and the definition of "Advocate-General" in S. 4 (1) (A) of the Code).

An ex-officio information should contain a statement of the charge as certain and detailed as an indictment. Allegations as to the opinion of the executive, likely to be very prejudicial to the accused, should not be included in a criminal information.

Under S. 342 of the Criminal Procedure Code, it is the duty of the Court, before drawing an adverse inference against the accused on any point, to call his attention to it and ask for an explanation.

The appellants were tried before a Bench of three Judges of the High Court, Patna, and a special jury, on an information exhibited by the Government Advocate pursuant to clause 17 of the Letters Patent, Patna, and S. 194, Criminal Procedure Code, and were convicted of perjury and conspiracy to fabricate false evidence, and sentenced to long terms of imprisonment.

Held, by the Privy Council, on a review of the whole evidence, (1) that there was no evidence whatever upon which the appellants could properly have been found guilty, (2) that they had been wrongly convicted and the convictions must be set aside, and (3) that the appellants, persons of unblemished reputation, had been the victims of a serious miscarriage of justice.

Consolidated appeals No. 111 of 1931 from convictions and sentences by the High Court, Patna, dated the 4th June, 1930.

Abdul Majid for appellant, Dwarkanath Varma.

Sir Dawson Miller, K. C. and *St. John Hutchinson* for appellant, Gaya Prasad.

Dunne, K. C. and *Wallach* for respondent.

27th January, 1933. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—These are two appeals against conviction and sentence by the High Court of Judicature at Patna. The appeal

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* P. C. Appeal No. 111 of 1931. 27th January, 1933.
Patna Appeals Nos. 45 of 1930 and 9 of 1931.

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of Gaya Prasad was brought by special leave of the Privy Council after an application for leave to appeal had been refused by the High Court. The appeal of Dwarkanath Varma was by leave of the High Court granted after the special leave had been given to the other appellant. Both appeals were consolidated by order of the High Court. The accused were tried before a Bench of the High Court consisting of the Chief Justice and Kulwant Sahay and Dhavle, JJ., and a special jury of nine persons, on an information exhibited by the Government Advocate by the direction and with the sanction of the Local Government pursuant to S. 17 of the Letters Patent constituting the High Court and S. 194 of the Code of Criminal Procedure, 1898. The appellant, Gaya Prasad, an Assistant Civil Surgeon, hereinafter called the doctor, was convicted of perjury and sentenced to five years' rigorous imprisonment; the appellant Dwarkanath Varma, a Sub-Inspector of Police, hereinafter called the Sub-Inspector, was convicted of conspiring with Ritbhanjan Singh, Subedar Singh and Ramdhani Singh and Gaya Prasad, to fabricate and give false evidence in Court with the intent to procure conviction for a capital offence of six named persons in breach of S. 120-B of the Indian Penal Code; and was also convicted of fabricating evidence in six particulars intending to cause the same six persons to be convicted of culpable homicide amounting to murder in breach of S. 194 of the Indian Penal Code. He was sentenced on each of these charges to 10 years' rigorous imprisonment, the sentences to run concurrently.

At the conclusion of the appeal their Lordships announced that they would humbly advise His Majesty to allow both appeals and to set aside the convictions, and would give their reasons later, as they now proceed to do.

The case was one of some complexity involving questions of considerable medico-legal interest. It has resulted in a miscarriage of justice which has caused two persons of apparently hitherto unblemished reputations to be wrongly convicted of serious offences and to receive sentences of long terms of imprisonment, part of which they have had to undergo. It will be necessary to go into some detail in order to explain in what circumstances this unfortunate result occurred.

On the 2nd August, 1928, the Sub-Inspector, who was stationed at Rohtas in the Province of Bihar and Orissa, was in

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the course of his duties when in the afternoon complaint was made to him by two men, Ritbhanjan Singh and Subedar Singh, of the village of Balbhadarpur, that at about 2 P. M. of that afternoon they and Ramdhani Singh had seen in Ritbhanjan's paddy field six men, Issardeyal Singh, Sheotahal Singh his son, Lokan Singh, Muneshwar Singh and Mundrika Singh (sons of Lokan) and Jitu Singh assaulting Rhitbhanjan's nephew, Jamadar Singh, with kicks, blows and sticks. Jamadar Singh told them that the bullocks of Issardeyal and Lokan were grazing in the field and that he was driving them away to impound them when he was attacked. The three men carried Jamadar to the village and there he died. They had left the dead body on the ground and had run to report the occurrence to the Sub-Inspector. Proceeding to the village he met Issardeyal and Muneshwar; they denied the charge, and alleged that while in their field they had been told by Dhanmantia, daughter of Lokan, that Jamadar had died; and that Jamadar's relations had assaulted Phulkumari, a female relative of Issardeyal, on the ground that by witchcraft she had brought about Jamadar's death. They said that Jamadar had been ill of cholera for three or four days and had died of it that day. The Sub-Inspector proceeded to make inquiries. In the result he arrested the six accused men for murder. He came to the conclusion that the story of the assault on the old lady was false. That same evening, in accordance with his duty, he dispatched the body of Jamadar for post-mortem examination to the nearest civil surgeon who was at the hospital at Sassaram, 50 miles away. With it he sent four bearers for the body had to be carried by hand on a *khatoli*; and an escort of three police officers under Constable Girwar Singh, who was entrusted with the necessary documents, accompanied by two relatives. The documents should have included the *surathal*, or inquest report, which was drawn up by the Sub-Inspector and the *challan* which described the escort and the circumstances in which the post-mortem was required. It is clear that by mistake two copies of the *challan* alone reached the doctor. The material part of it is in the column marked [5] "History of the cause of death which is at present ascertained." "As far as is known of the case at present the death of the deceased is said to have been due to severe assault by means of blows, kicks and butt ends of sticks. The deceased complained

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of severe pain on the left side of the chest before he expired. No apparent mark of injury is found on the person of the deceased." The body reached the hospital on the morning of the 4th August, and the post-mortem dissection began at about 10-30 A. M., *i. e.*, 42-43 hours after death. Decomposition had obviously commenced. The doctor in charge of the hospital was the appellant Gaya Prasad. He was a young medical practitioner who took his degree of M. B. at Calcutta University in 1925 and had been appointed Assistant Surgeon by the Government of Bihar and Orissa in June, 1926, and in August, 1928, was on duty at the hospital Sassaram. His chief, Dr. Tarak Nath Mittra, was at that time stationed as Civil Surgeon at Arrah. In that capacity he would have submitted to him the post-mortem reports sent out by the Assistant Surgeons at the various hospitals in this district as was done in this case. The doctor duly made the post-mortem examination and filled up the report. As the case against him turns on this report it is desirable to set it out verbatim.

Station—Sassaram, dated 4.8.28.

1. Name, caste and residence, if known—Jemadar Singh, of Balbhadarpur, police station, Rohtas.

2. Sex and age—Hindu Male, aged 28 years.

Hence brought.

3. Village—Balbhadarpur.

4. Police station—Rohtas.

5. Distance from dead house—50 miles.

6. Names of constables and relatives accompanying the corpse—(1) Girwar Singh, (2) Jharul Dusadh of Anandichak, (3) Jagpat Lall of Purnadih, (4) Subedar Singh, (5) Birich Singh.

Date and hour.

7. Of despatch from village—8 P. M., 2.8.28.

8. Of arrival of dead house—9.45 A.M., 4.8.28.

9. Of post-mortem examination—10.30 A. M., 4.8.28.

10. By whom identified to medical officer—(1) Constable Girwar Singh, (2) Choukidar Jharul Dusadh of Anandichak, (3) Dafadar Jagpat Lall of Purnadih, (4) Subedar Singh of Balbhadarpur, (5) Birich Singh of Balbhadarpur.

11. Clothes and articles sent in with corpse—(1) Maskin dhoti 1, (2) Markin gamcha 1, (3) Motia dohar 1, (4) Janaoa (sacred thread) 1, (5) Danda 1.

12. Remarks—No Surathal was supplied by the S. I. Rohtas nor there is any mention of name or address on challan certificate. The name and address is got from the command certificate.

I.—External Appearances.

1. Condition of subject-stout, emaciated, decomposed, etc.—The deceased is of average built R.M. passing—Sinuous fluid from the mouth and

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lips and nostril was coming out. Pupils were dilated. Mud was on all the exposed parts of the body mouth slightly open.

2. Wounds-position, size, character—

3. Bruises, position, size, nature—(1) 5 ecchymosises irregular *ante mortem* over the pit of the stomach just over and around the zitisternum more on the abdomen in an area of 3 inches. (2) Slight scratch with ecchymosis on the right side of back, 1¼ inches above the waist.

4. Mark of ligature on neck, dissections, etc.

II.—CRANIUM AND SPINAL CANAL.

1. Scalp, skull and vertebræ—Nil.

2. Membranes—Congested.

3. Brain and spinal cord—Congested the cerebrum slightly decomposed.

III.—THORAX.

1. Walls, ribs and cartilages—

2. Pleura—

3. Larynx and trachea—

4. Right lung—Highly congested, specially at the base and posterior side.

5. Left lung—Highly congested.

6. Pericardium—Pericardial cavity contained 4 ounces of bloody fluid and some clot.

7. Heart—The right auricle at the antero latteral was ruptured. Both chambers empty.

8. Large vessels—Full of bloody fluid.

IV.—ABDOMEN.

1. Walls—

2. Peritonium—

3. Mouth, pharynx and œsophagus—

4. Stomach and its contents—Was congested outside and inside contained some gas and one and a half of fæcal matter. There was some bile stain on the part surface of it.

5. Small intestine and its contents—The duodenum was ruptured on the latteral aspect just where the bile duct opens into it.

6. Large intestine and its contents—A linear rent of the ascending colon just at the bend of the hepatic flexture.

7. Liver—Ruptured at one place. See detail description to injury. Weight, 16¼ ch.

8. Spleen—Weight, 6¼ ch.

9. Kidneys—Left. Weight, 3 inches. Right kidney was ruptured. Weight, 3¼ ch. See detailed description of injury.

10. Bladder—Full, about 6 ounces of urine.

11. Organs of generation, external and internal—

V.—MUSCLE AND BONES.

1. Injury—
2. Disease or deformity—
3. Fracture—
4. Dislocation—

VI.—MORE DETAILED DESCRIPTION OF INJURY OR DISEASE.

1. Five ecchymosis over the pit of the stomach as described was irregular more on the abdomen than on chest over and around the zitisternum to an area of 3 inches, ante-mortem.

2. Scratch with ecchymosis on the right side of the back 1½ inches above the waist.

3. Congestion of the brain and membranes.

4. Pericardial cavity contained 4 ounces of bloody fluid with some clot,

5. A linear rupture of the right auricle ½ inch long and ½ inch broad, direction being from above downwards and taking on the antero latteral aspect near the opening of the superior vinacava.

6. Both chambers empty.

7. Abdominal cavity had fæcal odour and some fluid was in it.

8. Stomach was congested both inside and outside there was bile stain. It contained 1½ ounces of fæcal substance.

9. A linear rupture of the second part of the duodenum ½ inch by ½ inch extending from above downwards on the antero latteral aspect near the opening of the bile duct into it.

10. A linear rupture of the ascending colon on the antero latteral aspect 3 inches by ½ inch just at the zenu of the hepatic flexture, ½ inch of the rent was above the zenu and 2½ inches below it, from above downwards.

11. A linear rupture of the liver ½ inch by ¼ inch on the posterior side ½ inch above the lower margin of the right lobe. The direction being parallel to the lower margin.

12. A linear rupture of the right kidney 1 inch by ½ inch on the posterior aspect ½ inch from the hilum. The direction being from above downwards and innerwards.

VII.—OPINION OF SUB-ASSISTANT SURGEON AS TO CAUSE OF DEATH.

In my opinion death is due to shock due to the injuries detailed above.

(Signed) G. PRASAD, *Assistant Surgeon*,
Sassaram.

Dated 4.8.28.

VIII.—REMARKS BY CIVIL SURGEON.

I agree.

(Signed) T. N. MITTRA,
Civil Surgeon of Shahabad.

Their Lordships will revert to this document later. In the meantime it is desirable to notice that the information received in the *challan* that the death of the deceased was supposed to have been due to severe assault by means of blows, kicks and butt ends of sticks appeared to have been confirmed by the very serious internal injuries found to exist. One of the constables stated at the doctor's trial that he had told the doctor that the man had died of ras disease, a disease which is variously described by witnesses as being due to constipation, over-eating and purging or vomiting. No one at the trial suggested that the condition described indicated such a disease. The doctor, in his statutory explanation, denied that he had been so told; but it seems reasonably obvious that no one who found the appearances mentioned, and believed that they were the result of an assault before death, would attribute any importance to such a statement by a constable.

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The report was handed to the constable in charge and was taken back by him to the Sub-Inspector, whom it reached on the evening of the 5th August. It appeared to the Sub-Inspector and to his superior officers who now took up the investigation to afford irresistible evidence that the story of the prosecutors was true and that the story of the accused as to the man having died a natural death was false. On the 8th August the Superintendent of Police and the Deputy Superintendent arrived at Rohtas. The Deputy Superintendent of Police went to the village and examined the witnesses for himself. The Superintendent examined various witnesses at Rohtas and instructed the Sub-Inspector to obtain further evidence from the Assistant Surgeon as to the cause of each of the various injuries received by the deceased and the weapon used in inflicting them. The doctor had then left Sassaram and was stationed at Arrah, where the required information was obtained. It is as follows:—

DOCTOR GAYA PRASAD,

Will you kindly let me know your opinion on the points suggested by the S. I. The reply may be sent per bearer as the case is being delayed simply for want of your opinion on these points.

(Signed) R. N. SINHA,

D. S. P., 19.8.28.

The probable cause and nature of weapon inflicting the injuries are as follows:—

1. May be caused by severe blows or with blows by the ends of blunt weapons, *e.g.*, lathi and the like or might be due to friction against rough surface.

2. Same as No. 1.

3. Congestion of the brain might be due to the injuries described.

4. Might be due to hypertension and rupture.

5. Same as No. 4.

6. In this case due to blow given on the pit of the stomach and subsequent hæmorrhage and clot in the pericardial cavity.

7. Abdominal cavity had the odour due to rupture of the large intestine due to the blow over the kidney region (No. 2).

8. The staining of the outside stomach of bile is due to the rupture of the duodenum due to blow over the pit of the stomach (No. 1). The evidence of fæcal substance ought to be accounted for the anti-perstalsis of the ruptured large intestine (*i.e.*, vomiting caused by the rupture of the large intestine).

9. Due to blows given over the pit of the stomach and sides of the abdomen and back. The blows must have been severe and may have been inflicted by blunt ends of lathis or some such blunt weapon or fist or heel and the like.

10. Same as No. 9.

11. Same as No. 9.

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12. Same as No. 9.

(Signed) G. PRASAD, *A.S.*,
Arrah, 20.8.28.

On the 30th August the accused appeared before the District Magistrate, when most of the prosecution witnesses were called, including the doctor. Cross-examination was reserved. The doctor's evidence merely repeated the post-mortem report together with his further report as to the cause of the particular injuries. He added that the deceased would ordinarily die within two hours after receiving the injuries and might have been in a position to make a coherent statement up to the time of his death. At a further hearing before the magistrate defendants' advocates gave notice that they wanted to cross-examine the doctor at the Sessions Court and that they would file a list of defendants' witnesses on the 10th September. On that day the list was filed and the accused committed to Sessions on the charge of murder.

On the 5th-8th December, 1928, the charge was heard before the Sessions Judge and four assessors. On the 5th December the doctor was called and the complete record of his evidence given to the Court is as follows:—

Copy of deposition of DR. GAYA PRASAD, *Assistant Surgeon, before the Sessions Judge, on the 5th December, 1928.*

Deposition in Lower Court read out and admitted under S. 509, Criminal Procedure Code.

Further examined.

There was no sign of cholera. The man did not die of cholera.

I found fæcal matter in the body cavity. It was semi-solid. It was a healthy stool.

The deceased must have received a number of blows, probably twenty.

Cross-Examined.

I don't question the persons who bring a corpse to me. I depend on the documents sent to me by the police.

In some cases it may be difficult to say whether ruptures of internal organs are ante-mortem or post-mortem. I did not specially examine for traces of cholera.

To Court.—In my opinion the rupture of the organs was ante-mortem. The congestion of blood in some of the organs and the anti-peristaltic action of the intestines causing the fæces to come back into the stomach indicated this. At the sites of the ruptures there were clots of blood indicating that the injuries were ante-mortem.

I can't say how many hours before my examination he died.

Cross-examined by permission.

In some cases it is very difficult to differentiate between ante-mortem injuries and injuries inflicted just after death.

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The whole of the first paragraph of his answer to the Court was at the present trial assigned as perjury, on which he was convicted. The accused were convicted of murder by the Sessions Judge and sentenced to death. They appealed to the High Court, and on the 9th January, 1929, the High Court affirmed the conviction, but reduced the offence to culpable homicide not amounting to murder, and altered the sentence to imprisonment for life, except for a younger prisoner whose sentence was reduced to 10 years' imprisonment.

After the conviction of the accused before the Sessions Judge Phulkumari had been charged before the magistrate under section 182 of the Indian Penal Code with giving false information to the police as to the assault on her. It is noteworthy that when the charge was heard on the 26th January, 1929, she pleaded guilty. The note of the District Magistrate on the order sheet is as follows:—

"Accused pleads guilty and her statement recorded. She is an old woman. She admits to have lodged the false information with the police in order to create defence for her relations who were accused in a murder case and who have already been convicted and transported for various terms. Under the circumstances I think it would meet the end of justice to take a lenient view of the case. Musammat Phulkumari is convicted and sentenced to suffer simple imprisonment for one month as she is too old to undergo the sentence of hard labour."

Any question as to the murder of Jamadar now seemed to be settled. But dramatic developments soon occurred. The village was in a state of unrest at the result. In particular Issardeyal's wife was untiring in seeking to establish that injustice had been done. The police authorities directed Mr. A.R.P. Sinha, the Deputy Superintendent of Police at Patna, to hold an inquiry. As the result of his report and further inquiries by higher police officials the Local Government appear to have been satisfied that a miscarriage of justice had taken place. They remitted the unexpired portion of the sentence on the six convicts, and in January, 1930, appear to have directed the Government Advocate to exhibit an ex-officio information against the three original accusers Rhitbhanjan, Ramdhani and Subedar, who will hereafter be called the prosecutors, and the Sub-Inspector for fabricating and giving false evidence on a capital charge.

The power to exhibit an information to the High Court is given by S. 194 (2) of the Criminal Procedure Code, 1898, which provides that with the sanction of the Local Government

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the Advocate-General (which term by the definition clause S. 4 (1) (*a*) includes Government Advocate), may exhibit informations for all purposes for which His Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England. By S. 1 (*d*) the High Court may make rules for carrying this section into effect; but no rules appear to have been made. By S. 17 of the Letters Patent constituting the High Court at Patna, the High Court is given original criminal jurisdiction to try any person residing in places within the jurisdiction of any Court subject to its superintendence on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf. Their Lordships do not propose to determine finally the question of jurisdiction raised by the appellants' objection to the procedure in this case. They content themselves with saying that as at present advised the section of the Criminal Procedure Code and the clauses of the Letters Patent appear to show the objection to be ill founded.

The procedure was in any event novel, and their Lordships are unable to commend the forms adopted. It is well established that an ex-officio information should contain a statement of the charge as certain and detailed as an indictment. The first document filed by the Government Advocate was styled a petition exhibiting an information in the matter of Ss. 184 and 195 of the Criminal Procedure Code not under S. 194 at all. Later amendments refer to it as an information exhibited under S. 194. The so-called information entitled in the matter of the Sub-Inspector and the three prosecutors sets out the facts of the original trial, recites the attitude taken up by the public in the village, and the subsequent police inquiries, and states that the Local Government were satisfied that the whole case against the accused Muneshwar and others was false and had directed the release of the original accused and feel that the fresh materials upon which they came to this conclusion should be placed before their Lordships so that their Lordships might take such action as they might think proper. It is to be observed that no criminal charge is formulated against any one; and the allegations as to the opinion of the executive are quite out of place in a criminal information, likely to be very prejudicial to the accused, and ought never to have been included, The High Court, however, seem to have thought that they were justified

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in ordering the four accused to be arrested. On the 6th March the Government Advocate applied to amend the original information by adding a paragraph that the petitioner, having carefully examined the papers, also came to the conclusion that grave miscarriage of justice had occurred, due to the conduct of the 4 accused, and that there were strong reasons to believe that the accused had committed offences under Ss. 120-B and 194 of the Indian Penal Code. The form of this amendment does not appear to be much better than the original. On the same day, however, the Government Advocate did file an information with detailed charges against the accused. The first five paragraphs repeat the statements in the original information, and are subject to the criticism already made. Para. 6 formulates the charge of conspiracy against the four accused and is as follows:—

"6. That your petitioner charges the opposite party above-mentioned, *viz.*:—(1) Dwarka Nath Varma, (2) Ritbhanjan Singh, (3) Subedar Singh, and (4) Ramdhani Singh, that they between the 2nd and the 20th day of August, 1928, at Balbhadarpur, Sassaram, and other places in Shahabad agreed among themselves to fabricate and to give false evidence in Court with the intent to procure conviction for capital offence of (1) Muneshwar Singh, (2) Mundrika Singh, (3) Lokan Singh, (4) Issardeyal Singh, (5) Jitu Singh, and (6) Sheotahal Singh, residents of Balbhadarpur, police station, Rohtas, and thereby they committed an offence punishable under section 120-B of the Indian Penal Code, and within the cognizance of this Court."

Paragraph 7 in the first part formulates the charge of perjury against the Sub-Inspector as follows:—

7. That your petitioner charges accused Dwarka Nath Verma as follows:—

That he on the 6th day of December, 1928, at Arrah, in the course of trial No. 37 of 1928, before the Sessions Judge of Shahabad, made the following statements, each of which he knew or had reason to know to be false:—

(*a*) " I recorded the First Information Report (Exhibit No. 1) at Tipa Pahari. It was at 3 P.M."

(*b*) " The corpse was covered with mud."

(*c*) " I then went to the place of assault. In several sub-plots I found marks of grazing and of the feet of cattle. In one plot where the assault was said to have taken place I found marks of men's feet and disturbance of the mud and seedlings as if there had been a struggle."

(*d*) " Then I examined Ramnandan Singh before 7 P.M."

It then formulates the charge against the Sub-Inspector of fabricating false evidence as follows:—

And he fabricated the following evidence to wit:—

(*a*) So wording the First Information Report that it appeared as drawn up and signed at Camp Tipa Pahari while in fact it was done at Balbhadarpur.

(*b*) Falsely recording the statement in Diary No. 1, dated 2.8.1928, *viz.*:—

" No. 5 (Ramchandar Chaubey) stated that he was uprooting seedling in the field of Ramdayal Singh near village Uli. He was alone there. Ramkhelawan Dusadh and Tulsi Dusadh, sons of Harungi Dusadh, of Balbhadarpur, who were bringing bundles of seedling from the field of Ramdayal from near the Ahra of the village, told him that some fighting was going on near the field of Ritbhanjan Singh for grazing the field with bullocks. They did not name the members of the party. As he was far off he could not see nor he went there."

(*c*) Falsely recording the statement in Diary No. 11, dated 3.8.1928, *viz.*:—

" I came to the field of occurrence and as pointed out by the complainant I found marks of bullocks, hoofs in the field and outside on the western side both directing to and from the field. I found marks of rustling on the ground in the seventh portion. The plants of that place have been crushed in about 10 yards and the ground thoroughly trampled with footsteps."

(*d*) Falsely recording statement in Diary No. 11, dated 3.8.1928, *viz.*:—

" Examined Gopi Koeri, of Uli. He said that he never went to village Balbhadarpur to treat Jamadar Singh or any one . . . and in the afternoon went to Nauhatta Bazar and in the afternoon he heard there that Jamadar Singh had been killed in a Marpit while taking cattle to the pound from his paddy field by some men of his village."

(*e*) Falsely recording the statement in Diary No. 111, dated 4.8.1928, *viz.*:—

" I had a talk with several men of Naudiha, Anandichak and Nimhat and came to learn confidentially that this case was quite true and that the case of the Musammat Phul Kuer was totally false."

(*f*) Falsely recording the statement in Diary No. IV, dated 5.8.1928, *viz.*:—

" He (Girwar Singh) has brought the result of the post-mortem examination."

(*g*) Falsely recording the statement in Diary No. VI, dated 7.8.1928, *viz.*:—

" From the face of Tulsi it appears that he is concealing the truth. I tried my best to find out the truth from him but in vain, as he seemed to have received a very strong tutoring."

(*h*) Falsely antedating the initial on the post-mortem report.

Intending thereby to cause or knowing it to be likely that he will thereby cause the following five persons:—

" (1) Muneshwar Singh, (2) Mundrika Singh, (3) Lokan Singh, (4) Issardeyal Singh, (5) Jitu Singh, and (6) Sheotahal Singh, residents of Balbhadarpur, police station, Rohtas, to be convicted of the offence of culpable homicide amounting to murder which by the law of British India is capital, and thereby committed an offence punishable under S. 194 of the Indian Penal Code and within the cognizance of this Court."

The information then proceeds to charge each of the other three accused with perjury in their story of the assault and Rhitbhanjan and Subedar with fabricating false evidence in smearing the dead body of Jamadar with mud.

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On the same day the trial having been fixed for the 24th March, the Government Advocate exhibited an information against the doctor which is as follows:—

The humble petition of the above-mentioned petitioners
Most respectfully sheweth:—

1. That your petitioner craves leave to invite your Lordships' attention to the information exhibited by him on the 16th January, 1930, and the supplementary petition filed by him containing particulars of charges against the opposite party named and specified in the said petition. The petitioner prays that the said petition and the annexures thereto be also treated as parts of this petition.

2. That the opposite party, Dr. Gaya Prasad, is an Assistant Surgeon, and in the month of August, 1928, he was posted as such in the sub-division of Sassaram in the district of Shahabad.

3. That on the 4th August, 1928, the said Gaya Prasad held post-mortem on the dead body of a Jamadar Singh at Sassaram Hospital, and made a report upon examination of the injuries found on the person of the said Jamadar Singh that these were caused before his death, and that he had died from the effects of the said injuries.

4. That as a result of the enquiries held by Mr. A. K. P. Sinha, Deputy Superintendent of Police, C. I. D., Patna, and Mr. Sealy, Deputy Inspector-General of Police Crimes, Patna, which are more fully described in paras. 3 and 4 and 6 of the petition filed by the petitioner on the 16th January, 1930, it appears that the said report was deliberately false inasmuch as the injuries found on the person of Jamadar Singh were inflicted after death.

5. That the petitioner has examined the papers and materials connected with the enquiry above-mentioned and has come to the conclusion that there are good and sufficient reasons to believe that the opposite party above-named had committed various offences under the law, and your petitioner with the sanction of the Local Government invites your Lordships' attention to the information contained in the annexures to the petition filed on the 16th January, 1930, and begs to charge the accused on counts more particularly stated hereunder.

6. That your petitioner charges the said Dr. Gaya Prasad that he with (1) Dwarka Nath Verma, (2) Ritbanjan Singh, (3) Subedar Singh, and (4) Ramdhani Singh between the 2nd and 20th August, 1928, at Sassaram and other places in Shahabad agreed among themselves to fabricate and to give false evidence in Court with the intent to procure conviction for capital offence of (1) Muneshwar Singh, (2) Mundrika Singh, (3) Lokan Singh, (4) Issardeyal Singh, (5) Jitu Singh, and (6) Sheotahal Singh, residents of Balbhadarpur, police station, Rohtas, and thereby he committed an offence punishable under S. 120-B of the Indian Penal Code and within the cognizance of this Court.

7. That your petitioner charges accused, Dr. Gaya Prasad, that he between the 4th and 7th August, 1928, at Sassaram, fabricated the following evidence, *viz.*:—

(1) " Five ecchyommosis (?) over the pit of the stomach as described was irregular, more on the abdomen than on the chest over and around the ziphisternum to an area of 3 ' circular ante-mortem'.

(2) "In my opinion death is due to shock due to the injuries detailed above."

And the petitioner further charges the said Dr. Gaya Prasad with having made the following statements on the 5th December, 1928, at Arrah in the course of his deposition in trial No. 37 of 1928 before the Sessions Judge of Shahabad, each of which he knew or had reason to know to be false, *viz.*:—

"In my opinion the rupture of the organs was ante-mortem. The congestion of blood in some of the organs and the *ante peristaltic* action of the intestines causing the fæces to come back into the stomach indicated this. At the sites of the ruptures there was cloths (?) of blood indicating that the injuries were ante-mortem."

Intending thereby to cause or (knowing it to be likely that he would thereby cause) the following persons.—

(1) Muneshwar Singh, (2) Mundrika Singh, (3) Lokan Singh, (4) Issardeyal Singh, (5) Jitu Singh, and (6) Sheotahal Singh, residents of Balbhadarpur, Police Station, Rohtas, to be convicted of the offence of culpable homicide amounting to murder which by the law of British India is capital, and thereby committed an offence punishable under S. 194, Indian Penal Code, and within the cognizance of this Court.

8. That the petitioner begs to state that the Local Government have accorded sanction under Ss. 194 and 197, Criminal Procedure Code, for the prosecution of the said Dr. Gaya Prasad.

It is, therefore, prayed that your Lordships may be pleased to order that the opposite party named above be arrested and placed in custody and that he be jointly tried along with the order (?) accused persons named in the petitioner's petition, dated 16.1.30 by this Honourable Court on charges specified above or pass such other orders as may appear fit and proper.

And for this the petitioner shall ever pray.

It is to be noticed that the charge of perjury as against all the accused is drawn incorrectly. It charges the accused with having made statements in their depositions "which they knew or had reason to know to be false". It should be unnecessary to point out that a man may make a statement in the belief that it is true, though good reasons exist for knowing it to be false, for, unfortunately, man's beliefs are not always influenced by good reasons. The Indian Penal Code, S. 191, defines the offence of giving false evidence as "making a statement which he either knows or believes to be false and[1] does not believe to be true," and the information should have conformed to the Code. The prisoners were arraigned before the jury on the charge in this information; but the Chief Justice in summing up read to the jury the words of the Code, and though criticism was addressed to a particular passage in his address which appeared to indicate that a witness might be guilty of perjury if he omitted to tell the whole truth their Lordships taking as a whole the direction on this part of the law, find no reason to suppose that the jury were in any way likely to be misled.

On the 24th March the case came on before the Chief Justice, Mr. Justice Kulwant Sahay and Mr. Justice Davle and a special jury of nine. It lasted 50 days.

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1. or?—K. J. R.

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On the 4th June the Chief Justice summed up. He directed the jury that it was unnecessary for them to give a separate verdict on each assignment of perjury or each charge of fabricating evidence. The jury found the three original prosecutors guilty on every charge. They acquitted the Sub-Inspector of perjury, but found him guilty of conspiracy, and of fabricating false evidence. They acquitted the doctor of conspiracy, and of fabricating false evidence, but convicted him of perjury. Thereupon the accused were sentenced to the terms of imprisonment already mentioned.

Dealing first with the charge against the doctor their Lordships are satisfied that his conviction for perjury was not justified, and cannot be allowed to stand. The substance of the case against him was that he did not in fact hold the opinion that the injuries were ante-mortem. Now this statement had appeared in the post-mortem report, and in respect of it the jury had acquitted the doctor of fabricating it, following an intimation from the Chief Justice that they would be well advised to find that the charge of fabricating the report had not been made out. Appreciating the absence of any sufficient evidence that on the 4th August in stating his conclusion in the post-mortem report, the doctor was stating something that he knew to be untrue, the Chief Justice suggested to the jury that on the perjury charge which related to the 5th December, they might find that the accused did not in fact hold the opinion he expressed in the witness-box by considering those things which were before him on the 5th December quite apart from the things which were before him on the 4th August. But oddly enough there were no further facts before the doctor at the Sessions except two which would undoubtedly tend to confirm his opinion, viz.:—(1) That his chief had endorsed in writing agreement with his conclusion; (2) that the prosecutors had already before the Magistrate given evidence that Jamadar had in fact been assaulted; and there had been no cross-examination to indicate that their evidence was false. The facts that the Chief Justice impressed upon the jury were in no sense new facts at the Sessions. They were that at the present trial, the accused being asked for an explanation of the congestion of the organs, attributed the injury to the heart to hypertension, and that that theory must be newly formed or it would have been cross-examined to; and secondly that when asked generally

whether he wished to add anything he did not refer to the suggested absence of blood in the abdominal cavity.

Neither of the two suggestions seems with respect to have any bearing on the question whether the doctor had abandoned an honest opinion held on the 4th August and was professing dishonestly still to hold it on the 5th December, and they appear to have no substance in them. There is no indication that the theory of hypertension is new; it is still a theory that the injury to the heart was due to the assault. The stress laid upon the failure to explain the absence of blood is subject to two criticisms. In the first place the learned Chief Justice assumes that the doctor found no blood in the peritoneal cavity which their Lordships venture to think is by no means established by the post-mortem report. In the second place it appears to their Lordships that in this respect the accused doctor has serious ground to complain of his treatment. S. 342 of the Criminal Procedure Code provides that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court shall question him generally on the case after the witnesses for the prosecution have been examined. In pursuance of this section one of the puisne Judges put questions to the doctor. The only questions put on the contents of the post-mortem report were as to the congestion of some of the organs, the cause of antiperistalsis, and the omission from the report of the condition of faecal matter, and clots of blood at the orifices of the ruptures deposed to at the Sessions. The other question is a general question whether there was anything else he desired to say about the charges or the evidence. The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so it is plain that under S. 342 of the Code it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation. Probably the departure from the statutory rule was due to the fact that one Judge examined the accused while another summed up. But it deprives of any force the suggestion that the doctor's omission to explain what he was never asked to explain supplies evidence on which the jury should infer that six months before he had consciously abandoned a theory which four months before that he honestly held.

The fact is that the case for the prosecution broke down as soon as they failed to establish that the doctor was a party to

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a conspiracy with the prosecutors and the Sub-Inspector to bring a false charge against the then accused. On this point the prosecution failed to show that the doctor had ever heard of the deceased or his relatives or the accused. It was suggested that he knew the Sub-Inspector, and had recent written communication with him. Evidence to establish this was entirely lacking, and there can be no question that the verdict of the jury on this charge was inevitable. But on this footing there never was any motive at all for the doctor deliberately giving a false opinion. The charge of perjury could never have been even put on its legs if it were not for the excessive importance attached by the Chief Justice to the evidence of the doctors called by the prosecution that they would have expected much more blood in the pericardial cavity. The Chief Justice seems to have left the jury the choice of alternatives. "I must point out to you that the very considerations to support the theory that his opinion was honestly given are those upon which it can be most satisfactorily shown that at any rate he must be a most infernal fool." "If Jamadar died of disease and if, as the doctor says, no blood was found in the abdomen that fact should have struck him at once as conclusive against the view that the injuries were ante-mortem. On the other hand supposing Jamadar did die of injuries then the abdomen would have been full of blood and in that case he was a fool not to have noticed it. In any case he would seem to be a person who is not fit to do post-mortem work. If that be the state of his intellect then it may be that he might have held such an opinion as he expressed."

After opinions so expressed the jury may well have thought that any one possessing a medical degree from Calcutta University and appointed an Assistant Civil Surgeon could not have reached the depth of incompetence suggested, and that they were driven to the only other alternative, perjury.

It seems to have escaped them and the Chief Justice that the same considerations apply to the opinion expressed in the post-mortem report in respect of which the doctor was acquitted. It is not necessary here to discuss the degree of lack of skill in making the mistake if mistake it were of omitting to infer from the absence of the expected amount of blood that the ruptures were caused post-mortem. In view of the statement in the report that the abdominal cavity had fæcal odour and

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some fluid and in the deposition that in the body cavity there was some solid fæcal matter it was not correct to tell the jury that the doctor said that there was no blood in the cavity. In discussing the actual condition which might be expected it seems probable that the time that had elapsed since death, and the conveyance of the body on a stretcher over 50 miles of country, some of it a rough jungle track, would have to be considered. But when it is remembered that the story presented to the doctor was one of alleged assault, that the internal injuries found were obviously the result of violence, that at no relevant stage was it ever suggested to the doctor that violence had been applied after death, and that the only suggested disease cholera was clearly negatived, it does not seem remarkable that a medical man even with greater experience than this doctor should honestly have come to the conclusion that death was due to the alarming injuries which he found. In their Lordships' opinion there was no evidence of any kind upon which he could properly have been found guilty of perjury. Their Lordships feel bound to express the opinion that Dr. Gaya Prasad has been the victim of a serious miscarriage of justice and that the result of the hearing is to leave no stain on the integrity of his character as a professional man.

It is right to add that on the close of the case for the appellant leading counsel for the Crown with the candour which always characterises him announced that in view of the acquittal of the doctor on the other charges he could not support the conviction, and did not contest the allowance of the appeal.

It is now necessary to deal with the charge against the Sub-Inspector of Police. The charges upon which he has been convicted are:—

1. Conspiring with the three villagers to fabricate and give false evidence with the intent to procure conviction of the six accused of a capital offence.

2. Fabricating evidence as to seven cases by entries in his diary—in the fourth case by altering an initial in the post-mortem report. Of the seven diary cases the prosecution abandoned 1 and 5 and the Judge ruled that there was no evidence as to 7.

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On the question of conspiracy the Judge directed the jury that though the accused believed that the story of murder was true he might yet have conspired with the prosecutors that they should give the detailed evidence which they did give and that he should make false entries in his diaries. This appears to their Lordships likely to mislead the jury. There was no direct evidence of concert between the alleged conspirators. It had to be inferred from a number of facts. No doubt it is possible that the offence of fabricating evidence to obtain a capital conviction can be committed though the offender believes the accused to be guilty, and indeed though the accused is in fact guilty. And if the offence can be so committed, in like manner a conspiracy so to commit the offence may be established. But in this case the substance of the case is that the prosecutors invented the whole story of an assault and of course knew their story to be false. If the Sub-Inspector similarly knew or believed the charge to be false, and fabricated evidence in support of it, one can understand a jury being asked to infer a concert of the Sub-Inspector with the prosecutors to achieve the wicked result both are aiming for. But if one set of alleged conspirators know the charge to be false, and the other alleged conspirator has no such knowledge but believes the charge to be true, and it is his duty if true to pursue it, the inference of any concert between the two sets of conspirators is so far weakened as, measured by the standard of proof required in a criminal case, to disappear. But the summing up on this point is attacked on another point which it was essential to the accused Sub-Inspector to have put before the jury, and which does not appear to have been mentioned to them in this connection. The case of conspiracy against the Sub-Inspector is based upon his treatment of the villagers who supported the case for the defence that Jamadar had died a natural death from cholera, and that the injuries might have been caused artificially; and his omission to record statements to that effect in his diaries. It is also stated that he delayed the arrest and charge of the accused until he ascertained whether there was any bribe forthcoming from them. But it is obvious that whatever doubts the Sub-Inspector may have had in the first two days of the inquiry would be removed as soon as he received the post-mortem report, which now must be taken to have been made independently by the doctor without conspiracy between him

and the Sub-Inspector. A charge of murder by assault is made; the post-mortem discloses the most serious internal injuries with the opinion of the Assistant Surgeon confirmed by the Civil Surgeon that death was caused by the injuries. It is difficult to imagine what view would be formed by any intelligent policeman other than that the prosecution story was true and the defence story was false; and that whatever wealth of evidence was forthcoming in support of the defence merely indicated that the village possessed a horde of liars. This was the actual effect produced on the mind not only of the Sub-Inspector but also of his superior officers whose position in the matter was strangely depreciated in the summing up. In India, as elsewhere, a charge of murder is not left to the discretion of a Sub-Inspector of Police. The Superintendent and the Deputy Superintendent investigate for themselves, check the report of the Sub-Inspector, and the Superintendent or some higher official determines what charge is to be made. This course was followed.

The Superintendent went to Rohtas; the Deputy Superintendent, Ram Narayan Singh, went to Balbhadarpur, and, independently of and in the absence of the Sub-Inspector, took the evidence of witnesses and heard villagers put forward the case for the defence that the death was due to cholera and that the injuries must have been caused artificially. He laughed at the suggestion. He was called as a witness for the prosecution, and his evidence at page 454 in answer to the Court, who asked if it struck him as unimportant, was "At that time it appeared to me absurd and we simply laughed at the defence set up We thought it absurd in the face of the medical opinion." Elsewhere, at p. 419, he said "he was already overwhelmed with the medical opinion that the death was due to the injuries and that they were ante-mortem"; and at p. 447 the following question and answers appear to represent accurately the official view.

"Q. Is it true that during the police investigation or supervision by the higher officials the doctor's opinion is the guiding factor in the cases? A. Yes, plays a very important part. Q. And in this case, too, so far as your supervision was concerned the doctor's opinion was the guiding point? A. Yes, my supervision, and the Superintendent of Police's supervision."

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Their Lordships cannot suppose that there is any ground for disbelieving this statement. The Superintendent and the Deputy Superintendent found the medical report of overwhelming weight. But if so why not also the Sub-Inspector. And if he so treated it he would naturally brush aside or even deal more drastically with witnesses who came with what appeared a concocted story of death by cholera, and artificially produced post-mortem injuries. The result is that conduct of the Sub-Inspector indicating that he ignored the evidence of defence witnesses appears to afford no inference of a concert with the prosecutors to give or fabricate false evidence. Instead of allowing this contention to have its proper weight with the jury the Chief Justice thus dealt with the matter.

> Mr. Nageshwar Prasad next propounded a very ingenious but entirely fallacious argument. He said that the Sub-Inspector in any case was only the humblest member of a hierarchy of officials with many above him, and they all made the same mistake. He said that the supervising officer, the Magistrate, the Sessions Judge and the High Court all came to the same conclusion on the same evidence and that there is no reason why the poor Sub-Inspector should be selected for punishment for that mistake. The fallacy underlying that argument is that a supervising officer and above him the judicial tribunals formed their opinions upon the structure that had already been prepared by the Sub-Inspector. It is not as though each of these officials began a fresh investigation on the same evidence. The argument is ingenious but you will, I think, discard it.

Unfortunately the Chief Justice has fallen into a mistake of fact. The supervising officer did not form his opinion upon the structure which had already been prepared by the Sub-Inspector. As has been pointed out he, or rather they, examined witnesses on their own account, and were guided chiefly by the medical report which was in no sense part of any structure prepared by the Sub-Inspector. The only other point that need be mentioned is that there was evidence that the Sub-Inspector demanded and received a bribe from Ritbhanjan, one of the prosecutors. But there was also evidence that he demanded and received a bribe from the accused. Whether the jury accepted the evidence or not their Lordships do not know. If true the conduct of the Sub-Inspector is most reprehensible. But the fact, if established, that bribes were taken from both sides fails in the circumstances to afford sufficient evidence of a conspiracy with one side to fabricate or give false evidence. In the result it appears that the case for the defence of the Sub-Inspector was not left to the jury, and that there was no evidence upon which any jury could come to the conclusion

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that the Sub-Inspector had conspired to fabricate or give false evidence. Their Lordships have no hesitation in coming to the conclusion that the conviction on this charge must be set aside.

The conviction for fabricating evidence must also be set aside. A question of law arose at the trial upon which the learned Judges do not appear to have been in agreement, whether to enter a false record in a police diary can be said to be fabricating evidence at all, especially as cls. 162 and 172 of the Criminal Procedure Code appear to negative the admissibility of the entry as evidence save for the purpose of contradicting a witness whose statement is recorded in writing, or of contradicting the police officer himself. Their Lordships did not find it necessary to hear argument on this point from the appellant's counsel, and they do not propose to give any decision upon it. They leave the doubt to be resolved on another occasion. But the charge as framed is one of making false entries in diaries under five different dates as well as making an alteration in the post-mortem report. This charge involves at least six different offences, the falsity of each entry and the intention with which each was made require to be separately ascertained and established in each case to the satisfaction of the jury. The distinct offences were, it appears, separately charged in the information sufficiently to comply with S. 233 of the Criminal Procedure Code. The Chief Justice, however, directed the jury that if any one item were established against the Sub-Inspector they could give a general verdict of guilty on the charge of fabricating evidence. The result is that it is impossible to know whether the jury convicted on all or only one of the offences alleged, and if on one on which. A notable instance is item C, which records that the Inspector went to the place of assault and found hoof marks and the ground trampled with footsteps. This statement was repeated by the Sub-Inspector in his deposition at the Sessions and was assigned as perjury in the perjury charge upon which the jury acquitted him. And on this very charge the Chief Justice directed the jury that they should be very slow to come to the conclusion that it was perjury; and that the evidence was slender that at the Sessions Court the Inspector knew that this was a false case and that he was putting up a case of murder against men whom he knew to be innocent. "I think," he said, "you will be very slow to come to that conclusion!" It was

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part of the case for the prosecution that some of the diaries were written up together on the 6th August; and it is quite possible that if the jury had been directed that if they believed that to be done the writing up at one time might constitute one offence if the entries were false. But they were not so directed and some of the items stand as separate quite apart from such evidence.

Their Lordships do not find it necessary to discuss the specific facts of each item. It is sufficient to say that the considerations which they have expressed as to the conspiracy charge apply to these items, and that if they had been presented to the jury the verdict would almost inevitably have been different. The result is that on this charge also the conviction should be set aside.

For the above reasons at the conclusion of the argument their Lordships humbly advised His Majesty both appeals should be allowed and that the convictions of both Mr. Gaya Prasad and of Dwarkanath Varma should be set aside.

Their Lordships cannot part with the case without recording their opinion that the procedure adopted in this case of an ex-officio information was unfortunate and was undoubtedly prejudicial to the accused. It was a case where witnesses who were available at the former trial but not called, were called for the first time; and where witnesses who had given evidence at the former trial were called to contradict that evidence at the present trial. If the ordinary procedure had been adopted the evidence would have been given before a committing magistrate and the accused would have had ample notice and time to prepare. As it was there was no preliminary hearing, and though they received from the Crown in advance statements of what the witnesses would say, such statements had not been made on oath, and in some cases there is complaint of their being handed to the defence very late. Some of the evidence appeared to have been obtained while the trial was proceeding. This case did not differ from other cases of perjury and conspiracy which have been tried by the ordinary procedure; and its result it is to be hoped will be to discourage the recourse to unusual procedure in similar cases in the future.

Their Lordships have dealt with these appeals on the footing that the three other accused who have not appealed were

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rightly convicted. The acquittal of the doctor and the Sub-Inspector is consistent with the guilt of the original prosecutors. But having had the duty of considering the whole of the case their Lordships feel bound to record that they are left with an uneasy feeling that the conviction of the three villagers may be open to doubt. The conduct of the whole proceedings has not imbued them with confidence that a correct result has necessarily been reached. It would not be right for them to particularise the elements of doubt that might arise; they content themselves with expressing a hope that the life sentence of these three villagers will be carefully considered by the appropriate authority.

Solicitors for appellant, Dwarkanath Varma: *Hardcastle Sanders & Co.*

Solicitors for appellant, Gaya Prasad: *Watkins and Hunter.*

Solicitor for respondent: *Solicitor, India Office.*

K. J. R. *Convictions set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Mannaluri Yegnanarayanamurthi and another .. *Appellants** *(Plaintiff died, his legal representative died, her legal representative)*

v.

Munnaluri Balakrishnayya and others .. *Respondents (Defendants Nos. 1, 3 to 7 and 9 to 18).*

Yegnanarayanamurthi v. Balakrishnayya.

Civil Procedure Code (V of 1908), O. 22, R. 10—Decree against plaintiff—Death of plaintiff—Plaintiff's widow appealing against decree—Death of plaintiff's widow during pendency of appeal—Mortgagee of plaintiff's rights in suit applying to be substituted in plaintiff's widow's place and to be allowed to continue appeal—Competency to conduct the appeal, whether exists.

The appellant was a mortgagee of the rights of the plaintiff in the suit. The suit having been dismissed, the plaintiff's widow filed an appeal to the High Court against the decree, the plaintiff having died in the meanwhile. His widow also died, and the mortgagee filed an application to the High Court to be allowed to continue the appeal under O. 22, R. 10 (1).

Held, that the petitioner being a mortgagee of the deceased plaintiff's share in the suit properties, an "interest" as contemplated by O. 22, R. 10 devolved on him and he might therefore be allowed to continue the appeal.

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* Appeal No. 246 of 1928 and C. M. P. No. 995 of 1932. 15th December, 1932.

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He being thus declared competent to conduct the appeal, it must follow, the appeal having been dismissed, that he should pay the costs of the respondents.

Maharaja Sir Manindra Chandra Nandi v. *Ram Lal Bhagat*, (1922) L.R. 49 I. A. 220: I. L. R. 1 Pat. 581: 43 M. L. J. 589 (P.C.), distinguished.

Krishnan Pandalai, J.'s judgment in C. M. As. Nos. 69 and 70 of 1929 disapproved.

Srinivasa Aiyangar v. *Pratapa Simha Raja Saheb*, (1925) 49 M. L. J. 704, not applied.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in O. S. No. 4 of 1925.

Ch. Raghava Rao for appellants.

V. Govindarajachari, *K. Umamaheswaran*, *B. T. M. Raghavachari* for *V. Pattabhirama Sastri*, *V. Krishna Mohan* and *K. Kameswara Rao* for respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

Madhavan Nair, J.—* * * In considering whether, while dismissing the appeal, the appellant should be made to pay the costs of the successful respondents, we have to decide the question whether the appellant is competent to prosecute this appeal. The present appellant is a mortgagee of the rights of the plaintiff in the suit. The suit having been dismissed, the plaintiff's widow filed an appeal to this Court against the decree, the plaintiff having died in the meanwhile. His widow is now dead, and the mortgagee has filed an application to this Court to be allowed to continue the appeal. Under O. 22, R. 10 (1) "in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved". In *Maharaja Sir Manindra Chandra Nandi* v. *Ram Lal Bhagat*[1] it was held by the Privy Council that "where a decree for possession and mesne profits has been obtained, there is no power under O. 22, R. 10 or S. 47, Civil Procedure Code, to join as a defendant to the suit a tenant to whom during the pendency of the suit the defendant has let the property so as to compel the tenant to account for profits which he has received from the land". On the reasoning of their Lordships contained in this decision it is argued that the mortgagee of the plaintiff's interests in this case should not be allowed to continue this appeal.

The decision in *Maharaja Sir Manindra Chandra Nandi* v. *Ram Lal Bhagat*[1] was passed in appeal from the judgment of

1. (1922) L.R. 49 I. A. 220: I. L. R. 1 Pat. 581: 43 M. L. J. 589 (P.C.).

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the High Court of Patna reported in *Ram Kumar Lal Bhagat* v. *Raja Mukund Sahi*[1]. Their Lordships reversed the decision of the High Court. The facts of the case were briefly these. The respondents before the Privy Council instituted as plaintiffs a suit against one Raja Mukund Sahi to recover possession of six villages and a jungle which they claimed. The Court of first instance dismissed the suit. Just one year after the dismissal the Raja gave a lease for a term of years of the right of mining for mica, and otherwise exploiting the jungle, to the appellant before the Privy Council. On appeal by the unsuccessful plaintiffs the High Court reversed the decision of the first Court and made a decree in favour of the plaintiffs and remitted the case to the Lower Court to take an account of the mesne profits to which the appellants were entitled for three years prior to the institution of the suit and for the period thereafter till the delivery of possession. In inquiring into the mesne profits the Amin not only ascertained the rents which the Raja had received from the appellant before the Privy Council and the other tenants but also proceeded to inquire what were the profits which the various lessees might be taken to have made from the mica which they had extracted during the terms of their leases pending the somewhat protracted litigation. It is clear, as pointed out by the Privy Council, that in ascertaining such mesne profits the successful plaintiffs would not be entitled to the actual rents which the trespassing defendant had received, nor could the lessees be rendered liable for damages in that suit to which they were not parties in respect of the mica that they had removed. On the receipt of the Amin's report the plaintiffs (that is, the respondents before the Privy Council) relying on the statements with regard to the profits obtained from the mines made an application that the several lessees from the Raja should be made parties to the proceedings. The appellant before the Privy Council raised various objections and said that since he knew of the plaintiffs' claim to the property he had surrendered his leases and that he should not be made a party. The Subordinate Judge accepting his contentions dismissed the plaintiffs' application. The High Court in appeal from his order held, basing their order on the language of O. 22, R. 10, Civil Procedure Code, that "the appellants are entitled to have the persons in question added as

1. (1916) 1 Pat. L. J. 596.

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parties to the proceedings, and compel them to account for any profits which they may have received from the land". Their Lordships of the Privy Council set aside this order, and in doing so they considered the scope of O. 22, R. 10, Civil Procedure Code.

Its scope is thus described: "The order contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant. upon some one else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of R. 10 for all other cases. But, they are all cases of devolution." Then after referring to S. 372 and noting that the words 'in addition to' in the earlier Code have disappeared in the present Code their Lordships state this: "But the matter does not rest upon this change. The liability, if any, of the appellant to pay damages for removal of the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers and a case, if any, against the appellant must rest upon his action and the direct relation established thereby between him and the plaintiffs." And then they point out that serious injustice should be done if any other view was taken. The reasoning contained in the last extract we have quoted from the judgment affords the real basis of their Lordships' decision. O. 22, R. 10 relates to cases of devolution, and, as the liability of the appellant in that case was the liability of a trespasser which cannot be said to have devolved upon him from the defendant Raja, their Lordships held that he cannot be made liable in that suit and therefore refused to make him a party, the provision of O. 22, R. 10 in such a case being absolutely inapplicable. This is the reasoning of their Lordships and it is not affected, if we may say so with great respect, by the change in the language of the present rule. We may also point out that there is nothing in their Lordships' observations to justify the view that the devolution of interest contemplated in R. 10 is a devolution of the entire interest. The terms of the rule which speaks of a 'devolution of any interest' do not support such a view. For the above reasons it appears to us that the reasoning of their Lordships in the Patna case cannot be relied upon for the view that the mortgagee of the plaintiff's interests in the suit should not be substituted in the place of the mortgagor and be allowed to continue the suit

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on his death. For the same reasons we regret we are unable to accept as correct the contrary view enunciated by Krishnan Pandalai, J., in C.M.As. Nos. 69 and 70 of 1929 etc. The decision in *Srinivasa Aiyangar* v. *Pratapa Simha Raja Saheb*[1] has no application to the case before us, as in that case a mortgagee was sought to be brought on record after the termination of the suit.

In the present case the petitioner being a mortgagee of the deceased plaintiff's share in the suit properties, an "interest" as contemplated by O. 22, R. 10 has devolved on him and he may therefore be allowed to continue this appeal. We would therefore allow his petition. He being thus declared competent to conduct the appeal, it must follow, the appeal having been dismissed, that he should pay the costs of the respondents. It is argued by Mr. Raghava Rao on his behalf that the costs should be limited to the costs incurred by the respondents since the date of his application. We see no reason to limit the order in this manner. The appeal is dismissed with costs—one set.

The petitioner in C.M.P. No. 995 of 1932 will get his costs of the application.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE BARDSWELL.

Appaji Reddiar .. *Appellant* (Respondent in C. M. P. No. 5009 of 1928 in Appeal No. 299 of 1927 on the file of the High Court)*

v.

Thailammal .. *Respondent (Petitioner in do.).*

Appaji Reddiar v. Thailammal.

Letters Patent (Madras), Cl. 15—Judgment—Pending appeal—Death of appellant—Order impleading legal representative of deceased—Appealability.

Where during the pendency of an appeal the appellant died and an application having been made by one of the respondents claiming as legal representative of the deceased the Court brought him on record as appellant after going into the genuineness or otherwise of a will under which he claimed,

*L. P. A. No. 4 of 1930. 24th January, 1933.

1. (1925) 49 M. L. J. 704.

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Held, that the order bringing on record the respondent as the legal representative of the deceased was not a judgment within the meaning of Cl. 15 of the Letters Patent and was consequently not appealable.

Distinction between orders made in pending proceedings and orders made in proceedings which had abated pointed out.

Kyroon Bee v. *The Administrator-General of Madras*, (1915) 2 L. W. 948 and *Sarat Chandra Sarkar* v. *Maihar Stone and Lime Co., Ltd.*, (1921) I. L. R. 49 Cal. 62, distinguished.

Tuljaram Row v. *Alagappa Chettiar*, (1910) I. L. R. 35 Mad. 1 : 21 M. L. J. 1 (F. B.), referred to.

Letters Patent Appeal preferred to the High Court under Cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Jackson, dated 28th November, 1929 and made in C. M. P. No. 5009 of 1928 in Appeal No. 299 of 1927 (O. S. No. 18 of 1925, Sub-Court, Cuddalore).

N. S. Srinivasa Aiyar for appellant.

K. Bhashyam Aiyangar and *T.R. Srinivasan* for respondent.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—This is a Letters Patent Appeal from an order of Jackson, J. The question raised here is whether that order which was one ordering the respondent in this appeal to be brought on the record as the legal representative of the deceased original appellant is an appealable order or not. In my view, it is not. Applying the test applied by Sir Arnold White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar*,[1] this is certainly not an appealable order. That test has so often been referred to and I do not propose to re-state it here. I may however summarise my reasons for saying that this is an order which is not appealable. An order to be appealable must of course be a judgment within the meaning of Cl. 15 of the Letters Patent. In my view, this is not a judgment which finally settles the rights of parties but has the effect of allowing litigation which is proceeding further to proceed to a final adjudication. The facts of the case here are that the deceased original appellant filed this appeal and whilst it was pending died. Then an application was made to bring on record the respondent as her legal representative. The question as to whether or not the respondent was the legal representative of the deceased original appellant depended upon the genuineness or otherwise of a will. That was a matter which came before our learned brother. He first of all considered whether the

1. (1910) I. L. R. 35 Mad. 1 : 21 M. L. J. 1 (F. B.).

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will was a genuine one or not and having found that it was genuine he brought upon the record the respondent, the person who by the will was established to be the legal representative of the deceased original appellant. What was the effect of the order? Upon the death of the original appellant the appeal would have abated if within the period allowed for doing so no legal representative of the deceased appellant had been brought on the record. The result would have been that if no application had been made the appeal would have abated and the judgment of the Lower Court would have stood in favour of the appellant here. The effect of the order made by our learned brother is that the final adjudication upon this matter is not stopped by the death of the deceased original appellant. On the contrary the order makes it possible for an adjudication upon the matter under the appeal. I am clearly of the opinion that the cases quoted on behalf of the respondent here, namely, *Kyroon Bee* v. *The Administrator-General of Madras*[1] and *Sarat Chandra Sarkar* v. *Mailar Stone and Lime Co., Ltd.*[2], are of no application here at all. Those cases dealt with the position of suits which had already abated and the question was whether an order setting aside the abatement was an order which was appealable or not. The reason for deciding that the order was appealable was because by reason of the abatement of the appeal the respondent had acquired a valuable right and that the order setting aside the abatement had the effect of depriving the respondent of that valuable right. Hence it was held that there should be an appeal from such an order. That is not this case at all. For the reasons I have given, in my view, the preliminary objection taken by Mr. K. Bhashyam is a sound one and I must hold that there is no appeal from such an order as in this case.

This Letters Patent Appeal must, therefore, be dismissed with costs.

Bardswell, J.

Bardswell, J.—I agree.

B. V. V. *Appeal dismissed.*

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1. (1915) 2 L. W. 948. 2. (1921) I. L. R. 49 Cal. 62.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI AND MR. JUSTICE CURGENVEN.

R. A. Venkatathirisami Naidu and others .. *Petitioners** (*2nd Respondent and L.Rs. of 1st Respondent in A. S. No. 17 of 1926 on the file of the High Court*)

v.

R. V. Kasthuriranga Appaswami Naidu .. *Respondent* (*Applt. in do.*).

Venkatathirisami Naidu *v.* Kasthuriranga Appaswami Naidu.

Civil Procedure Code (V of 1908), S. 110—"Subject-matter in dispute"—Plaintiff's claim for over Rs. 10,000—Claim reduced before the High Court—Leave to appeal by the plaintiff—Interest pendente lite, *if can be included in the valuation.*

The plaintiffs brought a suit for accounts, valued at more than Rs. 10,000. The trial Court granted a decree for Rs. 3,860. On appeal by the defendant, the plaintiff presented a memorandum of objections claiming a sum of Rs. 2,118 in addition to the amount allowed by the first Court. The High Court dismissed the claim of the plaintiffs *in toto*. In support of their application for leave to appeal to the Privy Council, the plaintiffs contended that if to the amounts which they had lost in the High Court interest thereon from when it was due to the date of the High Court's decree was added, the subject-matter of the appeal would be of the requisite value.

Held, that as the award of interest subsequent to the date of suit was entirely discretionary to the Court and the plaintiff was not entitled to it as a matter of legal right, it could not, in the strict legal sense, be deemed to be part of "the subject-matter in dispute on appeal" within the meaning of S. 110 of the Civil Procedure Code.

It would be different in the case of a defendant; he should appeal against the whole decree, including interest *pendente lite.*

Ram Kumar v. *Muhammad Yakub*, (1920) I. L. R. 42 All. 445, referred to.

Petition praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioners herein to appeal to His Majesty in Council against the judgment of the Hon'ble Mr. Justice Wallace and the Hon'ble Mr. Justice Krishnan Pandalai, dated 19th April, 1932 and passed in Appeal No. 179 of 1926 preferred against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 32 of 1924.

S. Ramaswami Aiyar for petitioners.

K. S. Sankara Aiyar for respondent.

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*C. M. P. No. 4323 of 1932. 5th January, 1933.

Venkatathirisami Naidu v. Kasthuriranga Appaswami Naidu.

Curgenven, J.

The Court (Curgenven, J.) made the following

ORDER.—This is an application under S. 110 of the Code of Civil Procedure for permission to appeal to His Majesty in Council. The suit was brought on behalf of minor plaintiffs against the defendant, as executor under their father's will, for an account of his management of the estate. The valuation of the relief claimed was over Rs. 10,000, so that the case fulfils the first condition prescribed by the section, that "the amount or value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards". We are asked to hold that the second condition is also satisfied, that "the amount or value of the subject-matter in dispute on appeal to His Majesty in Council" is the same sum or upwards.

The decision of this point depends upon whether the plaintiffs, who are the petitioners, are entitled to include in their reckoning interest accruing subsequent to suit. The Court of first instance gave a decree which, after correction of an error, amounted to Rs. 3,859-14-10. This sum was the subject-matter of the defendant's appeal to this Court, and the plaintiffs presented a memorandum of objections claiming, in addition to it, a sum disallowed by the trial Court which, after deducting a certain amount given up, stood at Rs. 2,118-0-8. The result of this Court's decree was that the whole of the plaintiffs' claim was disallowed, and they were found liable to pay the defendant Rs. 173-7-11. The plaintiffs now desire to appeal to the Privy Council in respect of the three sums above specified, totalling Rs. 6,151-7-5, and to the amounts of the two former they claim to add a sum of Rs. 5,072-10-10, being interest from 31st January, 1918, when payment, it is said, was due from the defendant, up to 19th April, 1932, the date of this Court's decree. If this course is permitted, the value of the appeal will be well above Rs. 10,000, *viz.*, Rs. 11,224-2-3. If interest accruing subsequent to the institution of the suit is to be excluded, the value will be below the appealable minimum.

The learned advocate for the petitioners puts his case in this way: if the plaintiffs had fully succeeded both in the appeal and in the memorandum of objections before this Court, they would have obtained a decree which, with interest at 6 per cent. up to the date of that decree, would have exceeded Rs. 10,000; and from this decree the defendant could have appealed to the Privy Council. It must follow that the plaintiffs, who have

Venkatathirisami Naidu v. Kasthuriranga Appaswami Naidu.

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been denied the whole of this sum, have equally a right of appeal, since it would be inequitable and anomalous to withhold from the one a right which would, in the converse case, have been conceded to the other.

It is no doubt true that the value of a defendant's appeal is the amount of the decree of this Court, and that where interest up to its date is included the appellant is entitled to a certificate if the whole sum thus composed reaches the minimum figure of ten thousand rupees. That was decided by the Privy Council in *Gooroopersad Khoond* v. *Juggutchunder*[1], a case followed by their Lordships in *Bank of New South Wales* v. *Owston*[2]. But it does not necessarily follow that the converse proposition, as it is sought to apply it to a plaintiff's appeal, is true. The only case to which our attention has been drawn as directly deciding this point against a plaintiff is *Ram Kumar* v. *Muhammad Yakub*[3]. Apparently the decision in Moore's Indian Appeals was not cited before that Bench, but only the *New South Wales case*[2], which the learned Judges distinguished on the ground that whereas the law of New South Wales gives a decree-holder a statutory right to interest, in this country the grant of it is discretionary to the Court. Such a ground for distinction would not, of course, apply to the case in Moore's Indian Appeals, which proceeded upon no more than the fact that the decree comprised interest, and not upon any question of the decree-holder's right to claim it. We think that the real difference upon which the Allahabad Bench might have based its judgment is that, as here, they had in question a plaintiff's and not a defendant's appeal. A defendant must appeal against the whole decree standing against him. A plaintiff can do no more than appeal against the dismissal of his claim, as that claim stood at the date of his suit. The distinction is observed in assessing appeals of either kind to Court-fees, a plaintiff who appeals against the dismissal of his suit, as has been held in *Srinivasa Rao* v. *Ramaswami Chetti*[4] and *Vithal Hari Athavle* v. *Govind Vasudeo Thosar*[5] not having to include in his valuation interest accruing subsequent to suit, whereas a defendant must appeal against the whole decree, including any such subsequent interest. The real ground for this difference is that

1. (1860) 8 M. I. A. 166. 2. (1879) 4 A. C. 270.
3. (1920) I. L. R. 42 All. 445. 4. (1900) 10 M. L. J. 144.
5. (1892) I. L. R. 17 Bom. 41.

whereas a defendant has to get rid of any sum, whether principal or interest, decreed against him, a plaintiff cannot insist upon the award of post-plaint interest, as something to which he possesses a legal right. Its grant is, under S. 34 of the Code of Civil Procedure, discretionary to the Court, which may, if it thinks fit, 'order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree'. It is to be observed that not only is the question whether or not to award interest, but also the question at what rate to award it, left to the Court's discretion. It has, it is true, become in practice the rule to adopt the rate of six per cent. per annum, but nowhere is that rate prescribed, and there is nothing in law to prevent any Court from awarding some other rate. In 1860, as we see from *Gooroopersad Khoond* v. *Juggutchunder*[1] the Court rate was 12 per cent.; in the *New South Wales' case*[2] it was 8 per cent. The most then that a plaintiff-appellant can urge in support of his claim to include post-plaint interest at six per cent. in his valuation is that he is proceeding upon the assumption that a practice which considerations of convenience tend to make uniform would be observed in his case in the event of his success. And it must follow that, since there is no rule of law enabling him to enforce the award of interest, it cannot, in any strict legal sense, be deemed to be part of his claim against the defendant, or, to employ the language of S. 110, Civil Procedure Code, part of 'the subject-matter in dispute on appeal to His Majesty in Council'. If the plaintiff's suit is dismissed by this Court on appeal, the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the plaint and accepted by the trial Court; and it can make no difference whether that Court allowed the claim in whole or in part or dismissed it altogether.

For these reasons we conclude that no appeal such as the plaintiff proposes to prefer will lie, and it is unnecessary to decide the further question raised, whether or not that part of this Court's decree which affirms the decree of the trial Court should be disregarded. We dismiss the petition with costs.

S. R. *Petition dismissed.*

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1. (1860) 8 M. I. A. 166. 2. (1879) 4 A. C. 270.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Raju Thambiran .. *Appellant** (*Plaintiff*)

v.

Arunagiri Thambiran and others.. *Respondents* (*Defendants 1 to 3 and 5 to 23*).

Raju Thambiran *v.* Arunagiri Thambiran.

Hindu Law—Succession—Sudra illegitimate son—Share of—Suit for partition against legitimate sons—Maintainability.

The illegitimate son of a Sudra has no right by birth but receives what he does according to his father's pleasure; but on the death of his father leaving no collaterals, he becomes a coparcener and is entitled to a moiety of a son's share for which he can maintain a suit for partition against the legitimate sons and other descendants. The share of the illegitimate son is not confined to the self-acquired property of the father; it extends to all the property in the hands of the father, self-acquired or ancestral.

Case-law discussed.

Appeal in *forma pauperis* against the decree of the Court of the Subordinate Judge of Chingleput in Pauper O. S. No. 27 of 1924.

K. Rajah Aiyar for appellant.

C. Veeraraghava Aiyar for respondents.

The judgment of the Court was delivered by

Curgenven, J.

Curgenven, J.—The learned Subordinate Judge has decided this case against the plaintiff upon a preliminary point and it is unfortunate that the argument upon this point proceeded *ex parte*, because the consequence was that a clear current of decisions contrary to the position taken up by the Lower Court was not brought to its notice. This suit was brought by the illegitimate son of a Sudra against the legitimate sons and other descendants for partition of the family property, and the preliminary question which arose was whether in the circumstances of the case, there being no collaterals involved, such a suit would lie. The Lower Court has referred only to two cases and there is an essential distinction between those cases and the present case, namely, that they both related to families in which collaterals existed. *Gopalasami Chetti* v. *Arunachelam Chetti*[1] accordingly is no authority for the proposition which the preliminary issue raises in this case, nor is *Natarajan* v. *Muthiah*[2] which followed

*Appeal No. 344 of 1926. 3rd January, 1933.

1. (1903) I. L. R. 27 Mad. 32.
2. A. I. R. 1926 Mad. 261.

Raju Thambiran v. Arunagiri Thambiran.

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that case and which was taken to the Privy Council as *Vellaiyappa Chetty* v. *Natarajan*[1]. But if the learned Subordinate Judge had observed that *Ranoji* v. *Kandoji*[2] was cited in *Gopalasami Chetti* v. *Arunachelam Chetti*[3] and had carefully perused that earlier case he would have discovered certain propositions which would have made him hesitate to decide the matter as he did. In that case, to which the learned Judge Muthuswami Iyer, J., was a party, the fact is recognised that an illegitimate son does not become a coparcener by birth. But a consideration of the texts shows that where the father "has died 'vibakta' or separated, there can be no question that the right of the illegitimate son extends not only to his father's acquisitions but to ancestral property which may have come to the father's hands." (Page 561.) On the next following page it is expressly stated that the claim of the illegitimate son to a half of the son's share, which claim he could make if there were no collaterals, cannot be sustained against the undivided brothers of the father, and on page 563 an attempt is made to show why this should be so, namely, "that the property of a father separated from his brothers may well be subject to discharge an obligation to which it would not have been subject in the hands of unseparated brothers". The Lower Court has adopted the view that it would only be the father's self-acquired property which would be liable to a claim of this description, but the whole course of authority not only of this Court but in Bombay and in Calcutta is contrary to that position. To take the earliest Bombay case, which was a Full Bench case, *Sadu* v. *Baiza*[4], it was held that on the death of the father an illegitimate son and a legitimate son form a coparcenary between them and take the estate jointly as such with rights of survivorship, although the illegitimate son would only take a half of what he would have been entitled to if legitimate. This case was followed recently in *Sakharam* v. *Shamrao*[5], a case which is especially instructive here because there the father had already given his self-acquired property to the illegitimate son and after the father's death the illegitimate son sued the legitimate son for a share in the family property.

1. (1931) L. R. 58 I. A. 402: I. L. R. 55 Mad. 1: 61 M. L. J. 522 (P. C.).
2. (1885) I. L. R. 8 Mad. 557.
3. (1903) I. L. R. 27 M. 32.
4. (1878) I. L. R. 4 Bom. 37 (F. B.).
5. A. I. R. 1932 Bom. 234.

Raju Thambiran v. Arunagiri Thambiran.

Curgenven, J.

Accordingly that was a case which dealt specifically with the right to a share in the family property. In *Jogendro Bhupati Hurrochundra* v. *Nityanand Man Singh*[1], a Privy Council case, the same theoretical principles are recognised, following the text of the Mitakshara, that an illegitimate son has no right by birth but receives what he does according to his father's pleasure; but that after the death of the father he becomes a coparcener and that the legitimate brothers have to give him his due share. In this Court the case of a family with no collaterals has been directly dealt with in *Thangam Pillai* v. *Suppa Pillai*[2] and there again we find it laid down that the text states that when the father is alive, the illegitimate son takes his share by his (the father's) choice, but directs that after the father's death his legitimate sons should give him a moiety of a son's share, and again " It was nowhere held that he was entitled to the share allotted to him only by the choice of his legitimate brother, and that he could not recover that share by insisting on partition." In *Karuppannan Chetti* v. *Bulokam Chetti*[3] it is expressly stated that the text which forms the authority upon this point does not refer alone to the self-acquired property of the father. There are a number of other cases in which the law has been stated in similar terms. We need only refer to *Ramalinga Muppan* v. *Pavadai Goundan*[4] and *Annayan* v. *Chinnan*[5] and we do not think that any views contrary to this consistent body of opinion can be extracted from the Privy Council judgment in *Vellaiyappa Chetty* v. *Natarajan*[6]. In fact it embodies a survey of the law laid down by the Judges of this and the other Courts in India and clearly agreed with the conclusions so arrived at. We must accordingly allow this appeal, set aside the decree of the Lower Court, answer the issue (No. I-e) in favour of the plaintiff and remand the suit for disposal upon the remaining issues. The contesting respondents (defendants 1 to 3) will pay the appellant's costs in this appeal. Costs in the Court below will abide the result.

S. R. *Appeal allowed.*

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1. (1890) L. R. 17 I. A. 128. I. L. R. 18 Cal. 151 (P. C.).
2. (1888) I. L. R. 12 Mad. 401.
3. (1899) I. L. R. 23 Mad. 16.
4. (1901) I. L. R. 25 Mad. 519: 11 M. L. J. 399.
5. (1909) I. L. R. 33 Mad. 366: 20 M. L. J. 355.
6. (1931) L. R. 58 I. A. 402: I. L. R. 55 Mad. 1: 61 M. L. J. 522 (P. C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE BARDSWELL.

Sree Chelikani Venkatarayanim Garu .. *Appellant* in all (Respt. in S.As. Nos. 140 to 143 of 1928 on the file of the High Court)*

v.

The Maharaja of Pittapuram .. *Respondent in all (Appellant in do.).*

Venkatarayanim Garu *v.* The Maharaja of Pittapuram.

Madras Estates Land Act (I of 1908), S. 26 (3)—"Ryot"—Meaning of—Tenant-at-will in possession before grant, if included in the term.

The term "ryot" in S. 26 (3) is not confined to a ryot under the Estates Land Act to whom occupancy rights have been granted; it includes the former tenants of the land who were in possession before the date of the grant paying rent under a contract enforceable at law.

Where the agreement by the prior tenants to pay rent is not shown to be bad in law or prohibited by it, the rate of rents which they agreed to pay must, in the absence of any faisal rate, be considered to be a lawful rate.

Karuppa Kavundan v. *Narayana Chettiar*, (1917) 7 L. W. 376, distinguished.

Appeal under Cl. 15 of Letters Patent against the judgment of the Hon'ble Mr. Justice Madhavan Nair, dated the 3rd February, 1931, in S. As. Nos. 140, 141, 142 and 143 of 1928, respectively, preferred against the decrees of the District Court of East Godavari at Rajahmundry in A. S. Nos. 265, 261, 263 and 262 of 1925 preferred against the decrees of the Court of the Deputy Collector of the Head Quarters Division, Cocanada, in Land Suits Nos. 80 of 1924, 1, 7 and 6 of 1925, respectively.

P. Satyanarayana Rao for appellant.

Ch. Raghava Rao for *The Advocate-General (Sir A. Krishnaswami Aiyar)* for respondent.

The judgment of the Court was delivered by

The Chief Justice.—The question which arises in these Letters Patent Appeals is one under S. 26 (3) of the Madras Estates Land Act which reads as follows:— Beasley, C.J.

"Except as provided by sub-S. (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the ryot before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood."

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*L. P. Appeals Nos. 81 to 84 of 1931. 8th December, 1932.

Venkatarayanim Garu v. The Maharaja of Pittapuram.

Beasley, C.J.

The facts of the case have been very fully set out in the order of Madhavan Nair, J., in Second Appeals Nos. 140 to 144 of 1928 calling for a finding from the District Judge upon the question:

"Whether the rates now paid are lower than the lawful rates paid by these ryots on the suit holdings and, if lower, what were the rates that were paid before?"

The learned District Judge's finding is that "the rates now paid are in fact lower than the rates agreed to by these ryots on the suit holdings."

The position, therefore, is that the tenants of the suit lands prior to the date of the grant to the appellants in 1905 by the respondent's predecessor were, under an agreement with the then landholder, paying a higher rate of rent than that paid by the appellants.

The respondent claims that under S. 26 (3) the lower rate of rent paid by the appellants under the grant in 1905 is not binding upon him. Whether his claim is well founded must depend upon the construction of that section. The appellants claim that the rate should be that which was being paid by tenants of neighbouring lands and not that actually payable by the former tenants of this land because the latter tenants were tenants-at-will having no occupancy rights and were therefore not ryots within the terms of S. 26; and it is further contended that the words "the ryot" mean the ryot under the Estates Land Act to whom occupancy rights had been granted under the Act, namely, the appellant. These two contentions are really bound up in one another.

As regards the latter contention, the words of the sub-section clearly refer to the ryot in possession of the land before the date of the grant who may be an entirely different person to the person to whom the grant was made. But it is argued that such prior tenants were not ryots at all as the only ryots in the contemplation of the Act are ryots to whom occupancy rights have been granted under the Act. If this contention is right, then it means that S. 26 (3) does not provide for the case of a higher rate of rent paid by a tenant prior to 1908. This contention, in my view, cannot succeed. S. 6 of the Madras Estates Land Act reads as follows:—

"Subject to the provisions of this Act every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste situated in the estate of such landholder shall have a

permanent right of occupancy in his holding; but nothing contained in this sub-section shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act."

Venkatarayanim Garu *v.* The Maharaja of Pittapuram.

Beasley, C.J.

This section gives the ryots then in possession of ryoti land permanent occupancy rights. The former tenants of the suit lands, even though tenants only at will and not having occupancy rights, were in possession of ryoti land paying rent for that land and they were clearly ryots; and it has not been shown that the rates of rent paid were not lawful. They were paid under a contract enforceable at law and hence were lawful rates. In respect of the suit lands there was no faisal rate fixed for them and there were no faisal rates in competition with contract rates as was the case in *Karuppa Kavundan* v. *Narayana Chettiar*[1] which is referred to in support of the appellants' case.

There was no faisal rate at all here but only a contract rate. Madhavan Nair, J., says in his judgment:

"In my opinion the agreement of the predecessors of the appellant to pay the rents agreed to by them not being shown to be bad in law, or prohibited by it, those rates which they agreed to pay must be considered to be lawful rates."

With that opinion I entirely agree.

For these reasons, these Letters Patent Appeals must be dismissed with costs in L. P. A. No. 81 only.

Bardswell, J.—I agree with my Lord. Bardswell, J.

S. R. ——— *Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR JOHN WALLIS.

Mahanth Ram Charan Das .. *Appellant**

v.

Munshi Naurangi Lal and others .. *Respondents.*

P. C.

Ram Charan Das *v.* Naurangi Lal.

*Limitation Act (IX of 1908), Arts. 134, 144—Religious endowment—Alienation by Mahant of property of the math, without legal necessity—Alienation not void, but good to the extent of the Mahant's life-interest—No distinction between permanent mokurrari lease and out and out sale—Alienee's adverse possession—*Terminus a quo, *death of the alienating Mahant, and not date of alienation.*

Where a Mahant alienates property appertaining to the math without any legal necessity, the alienation is not void, but is good, though good only

*P. C. Appeal No. 92 of 1931. 17th January, 1933.
Patna Appeal No. 16 of 1930.

1. (1917) 7 L. W. 376.

P. C.

Ram Charan Das v. Naurangi Lal.

to the extent of creating an interest in the math property which endures during his tenure of office of Mahant of the math, with the result that the alienee's adverse possession of the property alienated only commences when the alienating Mahant ceases to be Mahant by death or otherwise. In this respect, there is no distinction in principle between a disposition purporting to be a grant of a permanent lease and a grant by way of absolute sale.

Where the Mahant without any necessity executed a permanent mokurrari lease of the math properties in December, 1909 and a sale-deed of the same properties in February, 1911, in favour of the defendants, and died in July, 1913,

Held, that a suit instituted in May, 1924 (*i.e.*, more than 12 years from the date of the alienations but within 12 years of the alienor's death) by his successor in office against the lessee and the purchaser to recover the alienated properties for the benefit of the math, was not barred by Art. 144 of the Limitation Act, as the possession of the defendants during the life of the alienating Mahant was not adverse, and only became adverse to the math and to the plaintiff-Mahant, as representing the math, when the alienor died.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*, (1899) L. R. 27 I. A. 69: I. L. R. 23 Mad. 271: 10 M. L. J. 29 (P.C.) and *Damodar Das* v. *Lakhan Das*, (1910) L. R. 37 I. A. 147: I. L. R. 37 C. 885: 20 M. L. J. 624 (P.C.), distinguished.

Vidya Varuthi Thirtha v. *Balusami Aiyar*, (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.), followed.

Subbaiya Pandaram v. *Mahamad Mustapha Maracayar*, (1923) L. R. 50 I. A. 295: I. L. R. 46 Mad. 751: 45 M. L. J. 588 (P.C.), referred to.

Judgment of the High Court, Patna, (I. L. R. 9 Pat. 885), reversed.

Appeal No. 92 of 1931 from a decree of the High Court, Patna, dated the 8th April, 1930, which reversed a decree of the Subordinate Judge of Patna, dated the 6th September, 1927, and dismissed the plaintiff's suit with costs.

The main question for determination on the appeal was, whether in the case of an alienation by a Mahant of the properties belonging to the math, without any necessity, the period of limitation for a suit by his successor in office to recover the properties reckons from the date of the alienation or the date of the alienor's death. The alienations in question were by way of permanent mokurrari lease and an out and out sale, and the High Court held that the case came well within the rule laid down by the Privy Council in *Damodar Das* v. *Lakhan Das*[1], and in their opinion the suit was barred by limitation, which as against the purchaser ran from the date of the sale. On an examination of the authorities, they came to the conclusion that the Board's decision in *Damodar Das's case*[1] had not been impliedly overruled by the later pronouncement of their Lordships in *Vidya Varuthi's case*[2].

The judgment of the High Court is reported in *Naurangi Lal* v. *Ram Charan Das*[3].

1. (1910) L. R. 37 I. A. 147: I. L. R. 37 C. 885: 20 M. L. J. 624 (P.C.).
2. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.).
3. (1930) I. L. R. 9 Pat. 885.

J. M. Parikh for appellant.—The suit was not barred by limitation, as it was brought within 12 years of the death of Mahant Rampat Das, who alienated the property. Possession of an alienee from a Mahant is not adverse *ab initio* to the idol, as the alienation is good and valid during the lifetime of the alienating Mahant: *Vidya Varuthi's case*[1]. For this purpose, no distinction can be drawn between a permanent mokurrari lease and a sale.

We concede that a Mahant, though a limited owner, does not hold an estate analogous to that of an ordinary tenant for life, but it is submitted that as he is at liberty to alienate the property of the idol and the alienation (though for an unjustifiable purpose) is good for his own lifetime, the possession of the alienee could not possibly be adverse to the idol so long as the alienor is alive and holds the office.

The High Court misunderstood the Board's decisions in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[2] and *Damodar Das* v. *Lakhan Das*[3]. There, the alienations being void, the possession was adverse from the start.

W. Wallach for respondents.—When (as in the present case) the property is vested in the idol as a juridical person, an alienation by the Mahant without necessity is void, and the possession of the alienee becomes adverse to the math from the date of the transfer. Each succeeding Mahant does not get a fresh start of limitation from the date of his succession as Mahant. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[2] and *Damodar Das* v. *Lakhan Das*[3]. The authority of these decisions is not impaired by the Board's later pronouncement in *Vidya Varuthi's case*[1] and the observation of Lord Blanesburgh in *Lal Chand Marwari* v. *Mahanth Ramrup Gir*[4] shows that *Damodar Das's case*[3] is still a "leading authority". In any event, it is submitted, that the principle of *Vidya Varuthi's case*[1], which related to a permanent lease by a Mahant, cannot be applied to the case of a sale, and the plaintiff-appellant's suit, being brought more than 12 years after the date of the sale-deed, was barred.

Parikh replied.

Reference was also made to the following authorities during the arguments:—

Jagadindra Nath Roy v. *Hemanta Kumari Debi*[5], *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[6], *Ishwar Shyam*

1. (1921) L.R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.
2. (1899) L. R. 27 I. A. 69: I. L. R. 23 Mad. 271: 10 M. L. J. 29 (P.C.).
3. (1910) L. R. 37 I. A. 147: I. L. R. 37 C. 885: 20 M. L. J. 624 (P.C.).
4. (1925) L. R. 53 I. A. 24: I.L.R. 5 Pat. 312 at 325: 50 M.L.J. 289 (P.C.).
5. (1904) L. R. 31 I. A. 203: I. L. R. 32 Cal. 129 (P. C.).
6. (1923) L. R. 50 I. A. 295: I. L. R. 46 Mad. 751: 45 M. L. J. 588 (P.C.).

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Chand Jiu v. *Ram Kanai Ghose*[1], *Nainapillai Marakayar* v. *Ramanathan Chettiar*[2], *Abhiram Goswami* v. *Shyama Charan Nandi*[3], *Nilmony Singh* v. *Jagabandhu Roy*[4], *Mahanth Ramrup Gir* v. *Lal Chand Marwari*[5], and on appeal *Lal Chand Marwari* v. *Mahanth Ramrup Gir*[6].

[The new Arts. 134-A, 134-B and 134-C, introduced by Act I of 1929, were also referred to, but it was conceded that the present suit, which was instituted in May, 1924, was governed by Art. 144 of the Limitation Act.]

17th January, 1933. Their Lordships' judgment was delivered by

Lord Russell of Killowen.

LORD RUSSELL OF KILLOWEN.—The question for determination on this appeal is whether the plaintiff's suit is barred by limitation.

The relevant facts must first be stated. In December, 1909, one Rampat Das was the Mahant of a Math situated at Paliganj in Patna District. On the 21st December, 1909, he executed a *mukarrari* or permanent lease of some 70 acres of land to Munshi Naurangi Lal under which the latter paid a premium and an annual rent to the Mahant. On the 13th February, 1911, he executed a sale deed of the land subject to and with the benefit of the lease to Musammat Sampat Kuer in consideration of Rs. 900. Each document states that it is executed by the Mahant for the expenses and necessities of the Math, but in view of the findings at the trial these statements may be disregarded, and it must be taken that neither of these documents was executed for legal necessity or was for the benefit of the Math or the deities installed therein.

Mahant Rampat Das died in or about July, 1913. On his death one Sant Das took possession of the Math claiming to be Mahant, but on the 20th February, 1916, by registered deed he surrendered all his rights to the plaintiff, who was and is the Mahant of a Math at Ramdih Baga. The registered deed included the 70 acres. The plaintiff claimed that Rampat Das had died without leaving behind any disciple, and that in those circumstances he, as Mahant of the Ramdih Baga Math, was entitled to take possession of the Paliganj Math (which was

1. (1910) L. R. 38 I. A. 76: I. L. R. 38 C. 526: 21 M. L. J. 1145 (P. C.).
2. (1923) L. R. 51 I. A. 83: I. L. R. 47 Mad. 337 at 352, 353: 46 M. L. J. 546 (P.C.).
3. (1909) L. R. 36 I. A. 148: I. L. R. 36 Cal. 1003 : 19 M. L. J. 530 (P.C.).
4. (1896) I. L. R. 23 Cal. 536.
5. (1922) I. L. R. 1 Pat. 475.
6. (1925) L. R. 53 I. A. 24: I. L. R. 5 Pat. 312: 50 M. L. J. 289 (P. C.).

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subordinate to and a branch of the Ramdih Baga Math) and all properties appertaining to it. Their Lordships, however, are not now concerned with any question of title, because both the Courts below have found that the plaintiff is the person in actual possession of the Paliganj Math and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the Math.

The plaintiff instituted the present suit on the 27th May, 1924, against the lessee, the purchaser and the husband of the purchaser, claiming possession of the 70 acres as property appertaining to the Paliganj Math and mesne profits.

A number of contentions were raised by the written statements, the two main ones being (1) that the 70 acres were the personal property of Rampat Das, and (2) that the suit was barred by the Limitation Act. The first contention failed completely. The 70 acres undoubtedly appertained to the Math. The second contention failed at the trial and it is the sole contention which survived before the Board. The Subordinate Judge held that the suit was not barred and gave the plaintiff a decree.

On appeal, the High Court decided that the suit was barred. Both Courts agreed (and rightly) that Art. 134 of the Limitation Act did not apply. The only Article applicable is Art. 144. This article, which applies to a suit " for possession of immovable property or any interest therein not hereby otherwise specially provided for," prescribes as the period of limitation twelve years from the time " when the possession of the defendant becomes adverse to the plaintiff".

The question then resolves itself into this: did the possession of the relevant defendant become adverse to the Math or to the Mahant as representing the Math at the date of the relevant assurance or at the date of the death of Rampat Das?

The Subordinate Judge held the latter date to be the correct date, and the suit to be within the 12 years. The High Court held the former date to be correct and the suit to be barred.

The Subordinate Judge, it would seem, reached his conclusion upon the footing that the title to the property was in the Mahant and not in the idols. His view was that, had the title been in the idols, the act of alienation would have been a

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challenge to the title of the idols and the limitation period would begin to run from the act of alienation; but since (as he found) the title was in the Mahant, possession only became adverse when a new title came into existence, the owner of which had not approved of the alienation. He came to this conclusion upon the authority of the cases of *Vidya Varuthi* v. *Balusami Ayyar*[1] and *Mahanth Ramrup Gir* v. *Lal Chand Marwari*[2] distinguishing the case of *Damodar Das* v. *Lakhan Das*[3].

The Judges of the High Court, in deciding that the period of limitation ran from the date of alienation, delivered a most painstaking and elaborate judgment, in the course of which all available authorities were reviewed and considered. They held that two cases before this Board (*Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[4] and *Damodar Das* v. *Lakhan Das*[3]) had affirmed the view that in a suit to recover the property of an idol or a Math the starting point for the period of limitation was the date of the alienation and not the date on which the successor of the alienor assumed office. They also held that the authority of those cases was in no way affected by the later decision of this Board in *Vidya Varuthi's case*[1].

Their Lordships do not think that it is necessary to follow the learned Judges of the High Court in their examination of the older authorities, but they must point out that the cases in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[4] and *Damodar Das* v. *Lakhan Das*[3] were both of them cases in which the assignment or disposition consisted of an assignment or disposition of the Math and its properties. Such an assignment was void and would in law pass no title, with the result that the possession of the assignee was perforce adverse from the moment of the attempted assignment. *Vidya Varuthi's case*[1], however, was the case (as here) of a disposition by the Mahant of an item of property appertaining to the Math, the disposition being in the form of a grant of a permanent lease. The disposition was one not made for necessity and so was beyond the powers of the Mahant to grant. But in delivering the judgment of the

1. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.).
2. (1922) I. L. R. 1 Pat. 475.
3. (1910) L. R. 37 I. A. 147: I. L. R. 37 C. 885: 20 M. L. J. 624 (P. C.).
4. (1899) L. R. 27 I. A. 69: I. L. R. 23 Mad. 271: 10 M. L. J. 29 (P. C.).

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Board, Mr. Ameer Ali used this most relevant and important language:—

"In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well-settled law of India (apart from the question of necessity which does not here arise) a Mahant is incompetent to create any interest in respect of the Math property to endure beyond his life. With regard to Mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. The receipt of rent was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue the tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

In other words, a Mahant has power (apart from any question of necessity) to create an interest in property appertaining to the Math which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of Mahant of the Math, with the result that adverse possession of the particular property will only commence when the Mahant who had disposed of it ceases to be Mahant by death or otherwise.

If this be right, as it must be taken to be, where the disposition by the Mahant purports to be a grant of a permanent lease, their Lordships are unable to see why the position is not the same where the disposition purports to be an absolute grant of the property; nor was any logical reason suggested in argument why there should be any difference between the two cases. In each case the operation of the purported grant is effective and endures only for the period during which the Mahant had power to create an interest in the property of the Math.

The same view is apparent in a later judgment of this Board, viz., *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[1]. The disposition in that case was a sale in 1898 of land devoted to charitable purposes, under an execution decree against the person who was the trustee of the charity. In the year 1913 the person who was then trustee of the charity sued to recover the property from the purchaser at the execution sale, or those claiming under him. It was held, not unnaturally, that the purchaser's possession was adverse from the date of

1. (1923) L.R. 50 I.A. 295: I. L. R. 46 Mad. 751: 45 M. L. J. 588 (P.C.).

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the sale; but in delivering the judgment of the Board, Lord Buckmaster, after referring to a case in *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*[1] and to *Vidya Varuthi's case*[2], said:

> "In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent *mukarrari* lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life, and a grant made for a longer period is good, but good only to the extent of his own life-interest. It follows, therefore, that possession during his life is not adverse."

This is a clear statement that a Mahant is at liberty to dispose of the property of a Math during the period of his life and that a grant purporting to be for a longer period is good to the extent of the Mahant's life-interest. Here again their Lordships think that the reference to life is upon the footing that the Mahant continues during his life to hold that office.

It will be observed that the statement is in no way confined to the grant of a lease, but covers the case of a purported out and out grant of the property. Whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated.

In view of these statements by the Board, their Lordships hold that in the present case the lease and the deed of sale of the 13th February, 1911, were good and effective so long as Rampat Das continued to be Mahant, and that therefore adverse possession only commenced when he died.

The result is that the plaintiff's suit is not barred, and the appeal succeeds. The decree of the High Court should be set aside with costs in that Court, and the decree of the Subordinate Judge restored. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs of this appeal.

Solicitors for appellant: *Watkins and Hunter.*

Solicitor for respondents: *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

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1. (1910) L. R. 38 I. A. 76: I. L. R. 38 C. 526: 21 M. L. J. 1145 (P. C.).
2. (1921) L. R. 48 I. A. 302: I. L. R. 44 M. 831: 41 M. L. J. 346 (P. C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD THANKERTON, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Thotapalli Sarvabhotla Venkata Chandikamba .. *Appellant**

v.

Indrakānti Viswanathamayya .. *Respondent.*

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Venkata Chandikamba *v.* Viswanathamayya.

Privy Council—Practice—New point not pleaded in the plaint.

A plaintiff-appellant cannot for the first time raise before the Privy Council a point not pleaded by him in the plaint, on which no evidence was called and no arguments adduced in the Courts in India.

Appeal No. 48 of 1931, by special leave, from a decree of the High Court, Madras, dated the 8th December, 1926, modifying a decree of the Subordinate Judge of Kurnool, dated the 29th April, 1922.

The judgment of the High Court is reported in *Venkata Chandikamba* v. *Venkata Row*, (1927) 53 M. L. J. 557.

Narasimham for appellant.

De Gruyther, K. C. and *Abdul Majid* for respondent.

27th January, 1933. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—The one point which is sought to be raised in this appeal by the appellant, who was plaintiff in the action, is a point which should have been pleaded by him in his plaint, and it has not been so pleaded. It has been pointed out that it required evidence to establish it, and no evidence has been called about it. It was not argued in the trial Judge's Court, nor was it argued before the High Court at the hearing of the appeal and cross-objections. The first time it was raised was on the application for review of the judgment of the High Court. Their Lordships are clearly of opinion that it is quite impossible to allow the appellant to raise the point without any pleadings and without any evidence before this Board, and they will humbly advise His Majesty that the appeal should be dismissed with costs and the decree of the High Court affirmed.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Harold Shephard.*

K. J. R. ——— *Appeal dismissed.*

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*P. C. Appeal No. 48 of 1931. 27th January, 1933.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD WRIGHT, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Rai Bahadur Sahu Har Prasad and others .. *Appellants**

v.

Shaikh Fazal Ahmad and others .. *Respondents.*

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Rai Bahadur Sahu Har Prasad *v.* Shaikh Fazal Ahmad.

Mahomedan Law—Wakf—Validity and operation of—Dedication of property obtained by sale—Sale subsequently declared invalid—One-third share obtained by purchaser as heir—If wakf attaches to—Transfer of Property Act, 1882, S. 8—Applicability.

On the 29th August, 1912, one Manzur Ahmad, a Sunni Mahomedan, executed a deed of sale in respect of two villages in favour of his mother, Rahim Bibi. He died on the 2nd September, 1912, and Rahim Bibi on the 23rd June, 1913, made a wakf of both these villages. In December, 1917, by a judgment of the Allahabad High Court, the aforesaid sale was declared to be void (as being in reality a death-bed gift in fraud of the heirs), with the result that Rahim Bibi took nothing by the sale-deed but was entitled, as an heir of her son, to one-third of the villages.

Held, that in determining what passed by the deed of wakf, and in order to ascertain Rahim Bibi's intention in executing it, the whole transaction (the sale and the wakfnama being integral parts of one transaction) had to be looked at; and since the sale was declared to be void, the wakfnama fell with it and was inoperative even to the extent of the one-third share which Rahim Bibi had acquired as her son's heir.

Quaere, whether S. 8 of the Transfer of Property Act had any application to the case.

Judgment of the majority of Judges in *Fazal Ahmad* v. *Har Prasad*, (1929) 116 I. C. 1: A. I. R. 1929 All. 465, reversed.

Appeal No. 55 of 1930 from a judgment and decree, dated the 19th March, 1929, of the High Court, Allahabad, which reversed a judgment and decree, dated the 6th July, 1925, of the Subordinate Judge of Pilibhit.

The facts of the case are fully set out in the judgments of the High Court, Allahabad, and in their Lordships' judgment.

Dunne, K. C. and *Wallach* for appellants.

De Gruyther, K. C. and *Abdul Majid* for respondents.

13th January, 1933. Their Lordships' judgment was delivered by

Sir Dinshah Mulla.

SIR DINSHAH MULLA.—This is an appeal from a judgment and decree, dated the 19th March, 1929, of the High Court of Judicature at Allahabad, which reversed a judgment and decree of the Court of the Subordinate Judge of Pilibhit, dated the 6th July, 1925.

*P. C. Appeal No. 55 of 1930. 13th January, 1933.
Allahabad Appeal No. 13 of 1929.

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Sir Dinshah Mulla.

The question involved in the appeal is as to the effect of a wakfnama executed by a Mahomedan purdanashin lady under the following circumstances:—

On the 29th August, 1912, Manzur Ahmad, a Sunni Mahomedan governed by the Hanafi law, executed a document purporting to be a sale of two villages, one situated in Pilibhit district and the other in Bareilly district, in favour of his mother Rahim Bibi for a consideration of Rs. 2,00,000. It was recited in the deed that Rs. 10,000 had been paid by Rahim Bibi. As to the balance of Rs. 1,90,000, it was stated in the deed that it was left with Rahim Bibi "with instructions that she should spend it at her discretion in charitable purposes for the eternal benefit of my (*i.e.*, Manzur Ahmad's) soul."

Manzur Ahmad died on the 2nd September, 1912, leaving him surviving as his heirs according to Mahomedan law two widows, his mother Rahim Bibi, and a paternal uncle Fazal Ahmad. On his death the widows became entitled between them to one-fourth of his estate, the mother to one-third, and the uncle as a residuary to the remaining five-twelfths.

On the 23rd June, 1913, Rahim Bibi executed a wakfnama of the villages transferred to her by the sale deed by which she constituted herself the first mutawalli, and appointed Fazal Ahmad, who is respondent No. 1 on this appeal, and three others who are respondents Nos. 3 to 5 as mutawallis after her death. It was recited in the deed that she had already spent Rs. 15,000 in charity, and a charge was created by the deed on the income of the wakf property for the payment of Rs. 25,000. The material part of the wakfnama is as follows:—

"My son Manzur Ahmad, deceased, sold the zamindari property in Bhitaura Kalan and Amkhara mentioned below to me for Rs. 2,00,000, took Rs. 10,000, a portion of the consideration money, from me and left the remaining amount of Rs. 1,90,000 with me as an amount dedicated for religious purposes and authorised me to spend the same. Out of the said amount Rs. 15,000 has been spent up to this time. Instead of spending the amount of consideration after which the charity shall come to an end, it is more beneficial to make a 'wakf' of the said property and utilize the income therefrom in charitable deeds as it will be a continual gift and permanent charity. I, therefore, while in a sound state of body and mind and of my own accord withdraw my possession from the entire 20 biswas 'asli' zamindari property in the village of Bhitaura Kalan, pargana and district Pilibhit and the entire 20 biswas 'asli' zamindari property, together with the cultivated lands in mauza Amkhara, pargana Richha, tahsil Baheri, district Bareilly, together with all the rights appertaining thereto and make a 'wakf' of the same in the name of the Almighty."

After the death of Manzur Ahmad, litigation ensued between the heirs, the result of which was that the sale of the

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villages was in December, 1917, held to be void, as being, under the cloak of a sale, in reality a death-bed gift in fraud of the heirs.

The effect of this decision was that Rahim Bibi took nothing by the sale deed, but was entitled, as an heir, to one-third of the villages. This one-third was sold by her on the 20th June, 1918, to appellant No. 1 and the father of appellants Nos. 2—6.

The question for decision in the appeal is whether this was a good sale, or whether the one-third share of Rahim Bibi had already been validly disposed of by the wakfnama.

Rahim Bibi died on the 15th August, 1921, leaving her surviving as her heirs respondents Nos. 2 and 3.

On the 9th September, 1924, Fazal Ahmad instituted the suit out of which the present appeal arises in the Court of the Subordinate Judge of Pilibhit as one of the succeeding mutawallis against the appellants and the heirs of Rahim Bibi and the other mutawallis for a declaration that the wakf was valid to the extent of the one-third share of Rahim Bibi in the two villages which she had acquired by inheritance from Manzur Ahmad, and that the sale to the appellants, being a sale of wakf property, was void, and for other reliefs.

The appellants alone contested the plaintiff's claim. They denied that the wakf was valid to the extent of the one-third share of Rahim Bibi, and pleaded that Rahim Bibi did not intend to create a wakf of what she inherited as an heir of Manzur Ahmad.

The Subordinate Judge held that there was nothing in the deed to indicate that Rahim Bibi intended to create a wakf of two-thirds as a vendee from Manzur Ahmad and of the remaining one-third as his heir, and passed a decree dismissing the suit.

From that decree Fazal Ahmad appealed to the High Court at Allahabad. The appeal was heard by Kendall and Niamatullah, JJ., who delivered separate judgments. Kendall, J., was of opinion that S. 8 of the Transfer of Property Act was decisive of the case. That section provides that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee the interest which the transferor is then capable of passing in the

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property, and in the legal incidents thereof." The learned Judge considered that what was transferred by the deed of wakf was "the zamindari property in the two villages," and not the interest which Rahim Bibi had acquired under the sale deed, and that although the wakfnama could not operate on two-thirds of the property, it operated on the one-third which Rahim Bibi owned at that date as an heir of Manzur Ahmad. On the other hand, Niamatullah, J., was of opinion that all that was intended to pass by the wakfnama was what Rahim Bibi believed she had purchased from her son, and that the wakf did not attach to what she acquired as her son's heir. The learned Judge added that Rahim Bibi was a purdanashin lady, and that it was for those who set up the wakfnama to show that the consequences that would follow if the sale deed were set aside were fully explained to her.

The learned Judges, assuming apparently that they differed only on a question of law, and that the case fell under the proviso to S. 98 of the Code of Civil Procedure, referred the following question to a larger Bench:—

"Whether the deed of wakf, dated the 23rd June, 1913, assuming it to be otherwise valid, operates on the one-third share of Mussammat Rahim Bibi in villages Bhitaura Kalan and Amkhara, or whether it is confined to such estate as she was believed to possess in them under the sale deed, dated the 29th August, 1912."

In their Lordships' opinion it is at least doubtful whether this procedure was correct, as the difference of opinion seems also to have covered the question raised by Niamatullah, J., as to the necessity for a fuller explanation of the effect of the wakfnama to Rahim Bibi, and this was not submitted to the new Bench.

The appeal, however, on the question so formulated, was heard by a Bench of three Judges consisting of the two referring Judges and Mukerji, J. Mukerji, J., agreed with the opinion of Kendall, J. Niamatullah, J., adhered to the view which he had previously expressed. The answer of the majority of the Judges was that the wakf attached to the one-third share of Rahim Bibi in the two villages. The result was that the appeal was allowed, and a decree was passed for the plaintiff on the 19th March, 1929. It is from that decree that the present appeal has been brought to His Majesty in Council.

The sole question for determination on the appeal is whether the wakf attached to the one-third share in the villages which Rahim Bibi acquired as heir of her son, Manzur Ahmad.

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In their Lordships' opinion the sale by Manzur Ahmad and the execution of the wakfnama must be regarded as integral parts of one transaction, and the sale being held to be void, the wakfnama falls with it. The sale deed imposed upon Rahim Bibi an obligation to spend Rs. 1,90,000, the balance of the purchase price, in charity, and the terms of the wakfnama leave no doubt that she executed the latter document in fulfilment of that obligation, and that she had no intention of making any contribution to the wakf from her own property. The wakfnama begins with a recital of the instructions contained in the sale deed, and after stating that Rs. 15,000 had already been spent by her in charity, it proceeds to say: " I, *therefore*, withdraw my possession from the entire . . . property and make a wakf of the same in the name of the Almighty." That she had no intention of settling anything of her own is also clear from the reservation of Rs. 25,000 which she had paid as a charge upon the villages to be repaid to her out of the income. The scheme was, no doubt, as was held in the former proceedings between the parties, a mere device to evade the Mahomedan law, but there is nothing to suggest any intention on the part of Rahim Bibi to do more than to carry this scheme into effect.

Their Lordships are therefore of opinion that the conclusions come to upon this question by the Subordinate Judge and Niamatullah, J., are correct. They think it at least doubtful whether S. 8 of the Transfer of Property Act has any application in the present case, but in any event they are of opinion that in order to ascertain the intention of the lady in executing the wakfnama, the whole transaction must be looked at, and upon this they think that her intention to settle only what she thought had been entrusted to her by her son is clear.

Having regard to the conclusion to which their Lordships here come upon the effect of the wakfnama, it is unnecessary to deal with the question raised as to the position of Rahim Bibi as a purdanashin lady upon which no issue was raised or tried in the Lower Court.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated the 19th March, 1929, should be set aside, and the decree of the Subordinate Judge, dated the 6th July,

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1925, restored. The respondents must pay the costs of the appellants in the High Court and before this Board.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Francis & Harker.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Ponnusami Chetty, *In re.*

Ponnusami Chetty .. *Petitioner* (1st Accused).*

Criminal Procedure Code (V of 1898), S. 162—Statement of witness made to the Police—Mode of use at inquiry or trial—Omissions in statement whether can be relied on—Evidence Act (I of 1872), S. 145.

A statement made by a witness to the Police in an investigation under S. 162, Criminal Procedure Code, cannot be used during an inquiry or trial in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the Police. The statement may be used in the manner laid down by S. 145, Evidence Act, only to show that the witness is contradicting something he has said before.

Observations of Macpherson, J., in *Badri Chaudhry* v. *King-Emperor,* A. I. R. 1926 Pat. 20, followed.

Hazara Singh v. *Crown,* (1927) I. L. R. 9 Lah. 389, *Mohinder Singh* v. *Emperor,* A. I. R. 1932 Lah. 103 and *Ittaf Khan* v. *King-Emperor,* (1925) I. L. R. 5 Pat. 346, considered.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Negapatam, dated 9th day of December, 1932 and made in P. R. C. No. 4 of 1932.

K. S. Jayarama Aiyar and *K. Venkataramani* for petitioner.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

The Court made the following

ORDER.—The point raised in this case is whether a statement made by a witness to the Police in an investigation under S. 162, Criminal Procedure Code, can be filed, or exhibited, or, in short, used, when the witness is under examination in an inquiry under Chapter XVIII of the Criminal Procedure Code in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the Police.

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*Cr. R. C. No. 14 of 1933. 16th January, 1933.
(Cr. R. P. No. 14 of 1933.)

Ponnusami Chetty, *In re.*

Statements recorded under S. 162, Criminal Procedure Code, can be used at a subsequent inquiry or trial for one purpose only, to *contradict* the witness. If they are to be used for this purpose the statements made under S. 162 must be duly proved, and used in the manner laid down in S. 145 of the Evidence Act. It follows, of course, that unless there is a *contradiction* between the statement recorded under S. 162 and the statement made by the witness in the course of his deposition, the statement recorded under S. 162 cannot be used at all. It is therefore obvious that the question raised in this must be answered in the negative, unless an *omission* from a statement under S. 162 can be said to be a *contradiction* of a statement made in the witness-box. Reduced to these terms the matter appears to be too simple to admit of any argument. Whether it is considered as a question of logic or of language, " omission " and " contradiction " can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To " contradict " means to " speak against " or in one word to " gainsay ". It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not " diction," and therefore it cannot be " contradiction ".

It is clear therefore that a statement under S. 162, Criminal Procedure Code, cannot be used during an inquiry or trial in order to show that a witness is making statements in the witness-box which he did not make to the Police.

The same conclusion follows from a consideration of S. 145 of the Evidence Act. If it is intended to contradict the witness *by the writing*, his attention must be called to those parts of the writing which are to be used to contradict him. It would be in my opinion sheer misuse of words to say that you are contradicting a witness *by the writing* when what you really want to do is to contradict him by pointing out omissions from the writing. I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that " a witness cannot be confronted with the unwritten record of an unmade statement " [*Mohinder Singh* v. *Emperor*[1]].

In the case cited, it was held by Coldstream, J., that the view of the learned Sessions Judge was not correct. Reference

1. A. I. R. 1932 Lah. 103 at 110.

Ponnusami Chetty, *In re.*

was made to the judgment of Dalip Singh, J., in *Hasara Singh* v. *The Crown*[1], but in neither of these cases was it explained how an omission could amount to a contradiction. The instance given by Dalip Singh, J., was that of a witness who should state under S. 162, Criminal Procedure Code, that three persons were beating a man, and should later allege that four persons were beating the same man. I would say with all respect that such statement would be in fact contradictory. It is impossible to state a case in which an omission amounts to a contradiction.

There is apparently no decided case in this High Court but I cannot see that there is any real difficulty in the matter. There is some apparent divergence of view in the Patna High Court. Mr. K. S. Jayarama Aiyar for the petitioner relies on the case of *Iltaf Khan* v. *King-Emperor*[2], whereas the learned Public Prosecutor relies on the observations of Macpherson, J., in *Badri Chaudhry* v. *King-Emperor*[3]. In the former case it appears to me (with all respect) that there is a slight confusion of thought. A witness named Mahabir Dubey, who during the trial had given evidence against the accused, had stated in cross-examination that when examined by the Police he had said that he had seen the accused that evening. This statement was contradicted by the Sub-Inspector of Police who apparently referred to his record of the statement made by the witness under S. 162, Criminal Procedure Code, and found therein no record of any statement by Mahabir Dubey of the fact that he has seen the accused that evening. In such a case as that, the statement of Mahabir Dubey in the witness-box, that he had seen the accused, was not contradicted either by the record of his statement under S. 162 or by the evidence of the Sub-Inspector. What the Sub-Inspector contradicted (refreshing his memory no doubt by reading the record he had made under S. 162) was *the statement of the witness that he had told the Police so and so*. It was a contradiction not of his evidence against the accused but of what he had said to the Sub-Inspector. And moreover it was a contradiction not between two statements made by the witness, but between a statement made by the witness and a statement made by the Sub-Inspector. For such a purpose as this, the statement under S. 162, Crimi-

1. (1927) I. L. R. 9 Lah. 389. 2. (1925) I. L. R. 5 Pat. 346.
3. A.I.R. 1926 Pat. 20.

Ponnusami Chetty, *In re.*

nal Procedure Code, cannot be used; it can only be used in order to show that the witness in the box is contradicting something he has said before. It appears to me, with respect, that the reasoning of Macpherson, J., in the case cited (*Badri Chaudhry* v. *King-Emperor*[1]) is entirely correct.

The evidence in the case now in question is not before me. Mr. K. S. Jayarama Aiyar tells me that certain witnesses appear to have stated to the Police merely that all the accused beat some one. In the witness-box these witnesses, I am told, have added allegations against particular accused of particular acts. The defence wants to file their statement under S. 162, Criminal Procedure Code, in order to show that when examined by the Police they did not attribute any particular acts to any particular accused. As the learned Public Prosecutor points out, the defence thus wants to use the statement under S. 162, Criminal Procedure Code, for a purpose not sanctioned by the Code. It is *not* permissible to use such statements in order to show "development" of the prosecution case; it is only permissible to use them to prove contradictions. In the present case there are no contradictions.

Mr. Jayarama Aiyar then asks how he is to contradict the witnesses when they say that they told the Police exactly what they are telling the Court. The answer is simply that he must contradict the witnesses on this point by adducing counter-evidence, exactly in the same way as he would contradict on any other point. He can put questions to the Police Officer to whom they made the statements under S. 162, Criminal Procedure Code, or he can cite witnesses, if any, who were present when those statements were recorded. He cannot, however, use the statements themselves.

It is not difficult to understand why the legislature has restricted the use of such statements to a single purpose. Some of the reasons have been enunciated by Knox, J., so long ago as 1894, and most of the language is still appropriate even after the changes introduced into S. 162, Criminal Procedure Code, in 1923. See *Queen-Empress* v. *Nasir-ud-din*[2].

"Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the Police during the investigation. Such statements are recorded by Police Officers in the most haphazard manner. Officers conducting an investigation

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1. A. I. R. 1926 Pat. 20. 2. (1894) I. L. R. 16 All. 207.

not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from bystanders. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their counsel."

The learned Sub-Magistrate's view of the provisions of S. 162, Criminal Procedure Code, is substantially correct. His actual order is not quite accurately worded. It is impossible to "read over" portions alleged to have been omitted; but the learned Sub-Magistrate only means that the witnesses are to be particularly questioned about the statements in their depositions which according to the defence were not made when the Police questioned them under S. 162, Criminal Procedure Code.

There is no ground for interference in revision.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

P. K. Krishnamurthi Chettiar .. *Appellant* (3rd Defendant)*

v.

K. S. A. S. Sathappa Chettiar and others. *Respondents (Plaintiff and Defendants 1 and 2).*

Krishnamurthi Chettiar *v.* Sathappa Chettiar.

Mortgage — Subrogation — Subsequent mortgagee paying off prior mortgage debt—Absence of knowledge of intermediate mortgage—First mortgage whether can be raised as a shield—Presumption applicable.

Where in pursuance of an agreement between the mortgagor and a subsequent mortgagee the latter paid a certain amount towards the discharge of a prior mortgage debt and it appeared that at the time when the payment was made the mortgagee was not aware of the existence of an intermediate mortgage in favour of another person,

Held, that the subsequent mortgagee who made the payment was entitled to the right of subrogation in respect of the amount he had paid. In such cases the presumption is that when the subsequent mortgagee paid off the prior mortgage he intended to keep that mortgage as a shield against the subsequent mortgagee and the knowledge of the existence of the second mortgage is not a material consideration in pleading the presumption.

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* Appeal No. 182 of 1926. 1st December, 1932.

Krishnamurthi Chettiar *v.* Sathappa Chettiar.

Gokaldas Gopaldas v. *Puranmal Premsukh Das*, (1884) L. R. 11 I. A. 126: I. L. R. 10 Cal. 1035 (P. C.); *Gangadhara* v. *Sivarama*, (1884) I. L. R. 8 Mad. 246 and *Andi Thevan* v. *Nagayasami Chettiar*, (1927) 55 M. L. J. 369, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 25 of 1924.

K. Rajah Aiyar, V. Ramaswami Aiyar and *K. S. Rajagopalachari* for appellant.

K. Bhashyam Aiyangar and *T.R. Srinivasan* for respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

Madhavan Nair, J.—The 3rd defendant is the appellant. The question for decision in this appeal is whether he is entitled to the right of subrogation to the extent of Rs. 1181-12-7 the balance of consideration on the first mortgage which he has paid off.

The facts are these:—The suit property was subject to four mortgages. The first mortgage is dated 20th November, 1918. The 3rd defendant has paid off the balance of the mortgage debt, namely, Rs. 1181-12-7. The second mortgage is dated 22nd April, 1921, and the mortgagee under it is the present plaintiff. The third mortgage with which we are not concerned is dated 30th November, 1921, and the fourth mortgage, dated 18th January, 1922, is in favour of the 3rd defendant the appellant. Under this mortgage he had to pay from out of the consideration the balance of the first mortgage. He paid it on 19th January, 1922. At that time he did not know of the existence of the plaintiff's mortgage and when he came to know of it he prosecuted the 1st defendant for "cheating". In the circumstances the appellant claims that he is entitled to the right of subrogation as against the plaintiff to the extent of the mortgage debt which he has paid off. The Lower Court disallowed the contention. The question has been dealt with in paragraph 11 of its judgment. The learned Subordinate Judge says "I do not think that an encumbrancer who in pursuance of the agreement between the mortgagor and the mortgagee pays a portion of the mortgage money towards a prior mortgage is entitled to priority or subrogation of the prior mortgage rights." Apparently the learned Judge treated the 3rd defendant as an agent of the mortgagor in paying off the balance of the mortgage debt and therefore he thought that the payment was on behalf of the mortgagor and not on behalf of himself. This ground of his decision is not tenable at all. In fact, Mr. Bhashyam Aiyangar

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for the respondents did not base his argument on this principle. His argument is this: that at the time when the payment was made the 3rd defendant did not know of the existence of the plaintiff's mortgage and therefore it cannot be presumed that he intended to keep the first mortgage as a shield against the second mortgage of the plaintiff. It appears to us that the question is a very simple one and has been decided once for all by the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[1]. In that case, their Lordships pointed out that a man having a right to act in either of the two ways, that is, either to extinguish or keep alive a mortgage, shall be presumed to have acted according to his interest. In this case the presumption should be that when the appellant paid off the prior mortgage he intended to keep that mortgage against all subsequent mortgages. But Mr. Bhashyam Aiyangar contends that the presumption should be held not to arise because he did not know at that time that the second mortgage existed. But the knowledge of the existence of the second mortgage is not a material consideration in pleading "the presumption," as has been held in *Gangadhara* v. *Sivarama*[2]. In that case the learned Judges referred to the case, *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[1] and treated the presumption as a general one the operation of which is not restricted by the question whether the man who makes the payment knew of the existence of the subsequent mortgage or not. The same conclusion was arrived at in *Andi Thevan* v. *Nagayasami Chettiar*[3]. In *Chidambara Nadan* v. *Muni Nagendrayyan*[4] it was held that a payment made by the subsequent mortgagee in discharge of a prior mortgage debt cannot be considered to be a payment made on behalf of the mortgagor. These three decisions dispose of the ground on which the Lower Court's judgment is based, and also the contention urged before us by Mr. Bhashyam Aiyangar. We therefore set aside the decree of the Lower Court and declare that the appellant is entitled to get priority over the plaintiff's mortgage to the extent of the balance of the consideration which he has paid off with reference to the first mortgage, that is, the sum of Rs. 1181-12-7 together with interest.

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1. (1884) L. R. 11 I. A. 126: I. L. R. 10 Cal. 1035 (P. C.).
2. (1884) I. L. R. 8 Mad. 246.
3. (1927) 55 M. L. J. 369.
4. (1920) 39 M. L. J. 445.

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The case will be remanded to the Lower Court for passing a final decree giving the appellant priority in the manner indicated above. The appellant is entitled to costs here and in the Court below with respect to the amount on which he has succeeded.

The Court-fee will be refunded.

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Navamani Nadar and another .. *Petitioners* (Plaintiffs)*

v.

Vedamanicka Nadar (deceased) and others .. *Respondents (Defendants and 1st Deft.'s L. Rs.)*

Navamani Nadar *v.* Vedamanicka Nadar.

Limitation Act (IX of 1908), Arts. 111 and 116—Scope of Art. 111—Direction to purchaser to pay off vendor's creditor—Default by purchaser—Decree obtained by creditor and vendor's properties sold in execution—Suit by vendor for damages—Starting point.

Art. 111 governs suits for unpaid purchase money payable to or to the order of the vendor under the agreement to sell and is independent of rights arising by the deed of sale. When the agreement to sell is embodied in the registered sale deed, a suit for compensation for breach of contract is governed by Art. 116.

Chunilal v. *Bai Jethi*, (1897) I. L. R. 22 Bom. 846, distinguished.

Seshachala Naicker v. *Varadacharar*, (1901) I. L. R. 25 Mad. 55: 11 M. L. J. 318, referred to.

Where the purchaser under a registered deed of sale undertakes to satisfy a mortgage debt of the vendor with part of the purchase money, there is implied in that agreement an agreement to indemnify the vendor against losses which may be caused by the action taken by the creditor on default of payment by the purchaser. Such an agreement to indemnify can be said to be broken only when the vendor is compelled to pay the creditor himself or (as in the present case) his property is sold in execution of a decree obtained by the creditor. Where, therefore, after the sale of his properties in execution in consequence of the default of the purchaser, the vendor brings a suit against the purchaser for return of the purchase money reserved with the latter, the suit being based on the implied contract of indemnity, the starting point of limitation is the date of the sale of the properties in execution when the vendor actually suffered loss and not the date of deed of sale executed in favour of the defendant.

Ram Ratan Lal v. *Abdul Wahid Khan*, (1927) I. L. R. 49 All. 603; *Ammani Bai* v. *Anant*, (1930) 33 Bom. L. R. 136 and *Ram Rackhya Singh Thakur* v. *Raghunath Prasad Misser*, (1929) I. L. R. 8 Pat. 860, followed.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tuticorin in S. C. S. No. 2266 of 1926.

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*C. R. P. No. 1495 of 1927. 24th October, 1932.

G. Jagadisa Aiyar for *T. L. Venkatarama Aiyar* for petitioners.

A. Swaminatha Aiyar for *L. S. Veeraraghava Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—The question in this petition is one of limitation. The suit was dismissed by the learned Subordinate Judge of Tuticorin on the ground that it was barred under Art. 111 of the Limitation Act as one for unpaid purchase money personally from the purchaser brought more than 3 years after the date of the sale. The facts are as follows. The plaintiff's father sold to the defendant on 28th April, 1919, for Rs. 500 a portion of the property which had been mortgaged by the vendor to a third party prior to the sale. The consideration of Rs. 500 was made up as follows: " Rs. 312-0-0 being the amount reserved with you (purchaser) in order that you (purchaser) may redeem the hypothecation executed by me; Rs. 88-0-0 received in cash and Rs. 100-0-0 to be paid before the Registrar, total Rs. 500." The purchaser paid Rs. 188 and took possession of the property. He did not pay the amount of the hypothecation to the third party who therefore brought a suit in 1924 impleading the mortgagor-vendor and purchaser-defendant and having obtained a decree sold the whole of the mortgaged property in execution on 29th October, 1926, including the property which was in the possession of the mortgagor as well as that which was sold to the defendant. This suit was brought on the 4th December, 1926, for Rs. 738-0-7 made up of Rs. 312 with interest thereon.

The Lower Court relied upon *Chunilal* v. *Bai Jethi*[1] in support of its view that Art. 111 governs the case and distinguished the decision in *Seshachala Naicker* v. *Varadachariar*[2] which pointed out that where a contract to sell is embodied in the deed of sale the Article applicable would be Art. 116. I think Art. 111 has no application to the present case. That Article governs suits for unpaid purchase money payable to or to the order of the vendor under an agreement to sell and, as the third column shows, is independent of rights arising by the deed of sale because the *terminus a quo* is the date fixed for completing the sale or the date of acceptance of the title which-

1. (1897) I. L. R. 22 Bom. 846.
2. (1901) I. L. R. 25 Mad. 55: 11 M. L. J. 318.

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ever is later. The present suit is not brought on any agreement to sell; nor, on the terms of the sale deed, which we may suppose contains the terms of the agreement to sell, is the amount sued for payable to or to the order of the vendor. *Chunilal* v. *Bai Jethi*[1] related to a parol sale of the year 1890 when the Transfer of Property Act had not been extended to the Bombay Presidency. The sale was for cash to be paid to the vendor, but instead of paying cash the purchaser signed an acknowledgment in the vendor's account book. It was held that the sale was completed and the title accepted more than three years before the suit. In the first place there was no registered sale deed in that case and in the second the whole of the consideration was payable in cash to the vendor. As pointed out in *Seshachala Naicker* v. *Varadachariar*[2] where the contract to sell is embodied in a registered deed of sale, the unpaid vendor can rely upon Art. 116 which allows six years from the date of breach. But the difficulty in the present case is that even six years from the date of the sale deed will not save the suit. It is therefore argued that the date of breach in a case where the purchaser undertakes in the sale deed to pay part of the purchase money to the vendor's creditors, secured or unsecured, is not the date of the sale deed but some later date, which is put in some cases as a reasonable time after the sale deed, in others as the date of demand and refusal, and in still others as the time when the vendor is himself compelled to pay the creditors whom the purchaser has defaulted to satisfy. Another line of reasoning which favours the postponement of the date for bringing a suit by the vendor is that where the purchaser agrees in a registered deed of sale to satisfy a mortgage debt or other debt of the vendor with part of the purchase money, there is implied in that agreement an agreement to indemnify the vendor against losses which may be caused by action taken by the creditors on the default of payment by the purchaser and such an agreement to indemnify is broken only when the vendor is compelled to pay the creditors himself or his property is sold.

It is curious that no decision of our own Court directly dealing with this topic was cited. In *Raghunatha Chariar* v. *Sadagopa Chariar*[3] it was held that in a transfer (of two

1. (1897) I. L. R. 22 Bom. 846.
2. (1901) I. L. R. 25 Mad. 55: 11 M. L. J. 318.
3. (1911) I. L. R. 36 Mad. 348: 21 M. L. J. 983.

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decrees), the consideration for which was that the transferee should pay the transferor's creditors, the transferor could sue the transferee for the money, even though the transferor himself had not paid off the creditors, on the transferee's default to do so within a reasonable time, but that the suit can only be for the consideration for the sale which the vendee failed to pay but not for any further damages which the vendor had not actually sustained. This implies that where the vendor has actually sustained further damages, by having to pay the creditors himself or by having his property sold, he is entitled to recover the damage actually sustained. I do not consider this decision as prohibiting a suit for the damages actually sustained after it has been sustained, if it is reasonable to infer that a contract of indemnity is to be implied in the circumstances.

There are however decisions of other Courts more to the point. In *Raghubar Rai* v. *Jaij Raj*[1], a case like the present except that the vendor had not in fact himself paid the secured creditor whom the purchaser had undertaken to pay, it was held that it was not necessary for the vendor to have paid the creditor before bringing the suit and that as no time was fixed in the sale deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed. This view however was dissented from in *Ram Ratan Lal* v. *Abdul Wahid Khan*[2], where the vendor had been compelled to pay a mortgage debt himself and it was held that limitation in respect of the vendor's suit against the purchaser will not begin to run until he has been compelled to pay. *Makund Lal* v. *Bhola Rai*[3] was a case where the vendor's unsecured creditors had to be paid off by the purchaser and it was held that the vendor could recover the unpaid money within six years from the date of the sale deed. *Ammani Bai* v. *Anant*[4] was a case in which the vendor's creditor had recovered the money from the vendor on the purchaser's default to pay. The sale was in 1912; the vendor was compelled to pay the same debt in 1921. The vendor's suit against the purchaser was brought in 1924, *i.e.*, within three years of the actual payment but 12 years after the sale deed. It was held that the Article applicable was 116 and that time began to run when the plaintiff actually suffered the loss, which was the date when the purchaser's agreement became

1. (1912) I. L. R. 34 All. 429.
2. (1927) I. L. R. 49 All. 603.
3. A. I. R. 1931 All. 419.
4. (1930) 33 Bom. L. R. 136.

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impossible of performance by reason of the payment by the vendor himself. *Ram Rachhya Singh Thakur* v. *Raghunath Prasad Misser*[1] is a case which adopts the same reasoning. It was held that the *terminus a quo* was not the date of the execution of the sale deed but the date on which the contract was deemed to have been broken, namely, the date when either there was a repudiation of the liability under it or when the contract had become impossible of performance on account of the vendor's debt having been satisfied and also that the measure of compensation to be awarded is the amount of the debt with interest.

It occurs to me that it is necessary to distinguish claims of two kinds which may arise in this connection. A vendor may reserve part of the purchase money with the purchaser entirely for payment of the vendor's debts in the payment of which the purchaser has himself no primary interest. These may be unsecured creditors of the vendor for which the vendor alone is liable or secured creditors of the vendor where the security is other than the property sold. On the other hand such a reservation may be for payment of debts in which the purchaser as owner of the property purchased becomes solely primarily interested. It may be to pay off a previous mortgage covering only the property sold. In this case except by way of the vendor's personal liability for any deficiency that may arise on the mortgage, the purchaser subject to the mortgage becomes the only person interested in the payment. If he does not pay, the previous mortgage debt will be realised from his own property and no one else's. It is difficult to see how in such a case, except where the vendor is proceeded against on his personal liability, he can bring a suit if the purchaser fails to pay off the mortgage on the property which he has bought. But the reserved portion of the price may be, as it is in this case, to pay off a mortgage which covers not only the property bought but also some other property which the vendor is entitled to be freed from the mortgage by the payment undertaken by the purchaser. In such a case the vendor is entitled to see that by the purchaser's default the mortgaged property left with him is not endangered. In brief, the suits which a vendor is entitled to bring for the reserved amount against the purchaser before himself paying the amount or suffering some other damage are

1. (1929) I. L. R. 8 Pat. 860.

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cases in which he alone is entitled to benefit by the payment. But where, as in this case, the benefit of the payment of the reserved amount accrues partly to the purchaser himself and only partly to the vendor, it is not possible for the vendor to sue the purchaser for the whole amount reserved. In such cases he can only sue for the portion of the amount the non-payment of which is likely to affect him, and this can only be properly determined when he has either made the payment himself or has suffered some other damage by the purchaser's default. The basis of the suit in such a case is the contract of indemnity which the agreement in the sale deed implies and can be held to be broken only when the plaintiff has actually suffered loss. I am therefore of opinion that the limitation in this case began to run when the plaintiff's property was sold on the 29th October, 1926, and therefore the suit was not barred.

Another point depending upon this and following from it is the amount which the plaintiff is entitled to recover. As the plaintiff is not entitled to recover the whole of the Rs. 312 because a portion of it was also to release the property sold to the defendant from the mortgage he can recover only the loss actually sustained by him. What it is, has yet to be ascertained. The decree of the Lower Court is therefore set aside and the suit remanded for re-trial and disposal according to law. The petitioners must have their costs in this Court from the counter-petitioner.

S. R. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Narappa Naicken .. *Appellant* (Counter-petitioner—Decree-holder)*

v.

Govindaraja Naicken (minor) by guardian Muthammal (*vide* Order, dated 21st July, 1931, C. M. P. No. 1451 of 1931). *Respondent (Petitioner—Judgment-debtor).*

Narappa Naicken v. Govindaraja Naicken.

Civil Procedure Code (V of 1908), S. 13—Foreign judgment passed without jurisdiction—Submission to—When effective to validate the decree—Application to foreign Court to set aside ex parte *decree, if amounts to voluntary submission.*

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*A. A. A. O. No. 132 of 1928. 23rd November, 1932.

Narappa Naicken v. Govindaraja Naicken.

The judgment pronounced *in absentem* by a foreign Court is a nullity and not binding on the judgment-debtor unless he had submitted to its jurisdiction. The submission must be in the suit itself and before the decree was passed. If the decree at the time when it was passed was an absolute nullity, it cannot be subsequently and retrospectively clothed with jurisdiction by an application by the judgment-debtor to the foreign Court to set aside the *ex parte* decree.

Hari Singh v. *Muhammad Said*, (1926) I. L. R. 8 Lah. 54, not followed.

Sheo Tahal Ram v. *Binaek Shukul*, A. I. R. 1931 All. 689; *Gurdyal Singh* v. *Raja of Faridkot*, (1894) L. R. 21 I. A. 171: I. L. R. 22 Cal. 222: 4 M. L. J. 267 (P. C.), referred to.

Held also that assuming the application made by the judgment-debtor to the foreign Court was a submission, it could not be deemed voluntary since the judgment-debtor, unaware of that he could challenge the validity of the decree, made the application as the only alternative to undergoing a term of imprisonment.

Appeal against the order of the District Court of Coimbatore, dated the 6th day of March, 1928 and made in A. S. No. 214 of 1927 preferred against the order of the Court of the District Munsif of Tiruppur, dated the 5th day of August, 1927 and made in E. A. No. 280 of 1927 in E. P. R. No. 89 of 1927 (in O. S. No. 929 of 1098 on the file of the Court of the District Munsif of Quilon).

T. M. Krishnaswami Aiyar and *K. Balasubrahmania Aiyar* for appellant.

K. Bhashyam Aiyangar and *V. C. Veeraraghava Chariar* for respondent.

The Court delivered the following

JUDGMENT.—The appellant holds a money decree passed *ex parte* against the respondent by the Court of the District Munsif of Quilon. It was transferred to the Court of the District Munsif of Tiruppur for execution and the judgment-debtor was arrested. An application by him for his release on security for the purpose of getting the decree set aside was granted and he thereupon applied to the Quilon Court to set aside the *ex parte* decree. In that application the Quilon Court ordered an *interim* stay but eventually dismissed it for default and intimated to the Tiruppur Court that it might proceed with the execution. Thereupon the judgment-debtor filed an application to set aside the order of arrest and dismiss the execution petition on the grounds that the foreign Court had no jurisdiction to pass the decree against him and that he had not submitted to it. The District Munsif dismissed the application on the ground that although the decree, being passed without jurisdiction, was a nullity, yet the judgment-debtor by applying to have it set aside had made a voluntary submission to the Court.

The learned District Judge has differed from the District Munsif on this latter point, holding that in the circumstances of the case the judgment-debtor must be held to have acted under compulsion.

The first point that arises for consideration in my view is whether a decree passed without jurisdiction can be validated by submission, not in the suit itself and before the decree was passed, but after the decree had come into existence. It is contended that if the decree at the time when it was passed was a nullity, no subsequent action on the part of the judgment-debtor can have validated it. This point has been considered by the learned District Judge, who has followed a ruling in *Hari Singh* v. *Muhammad Said*[1]. That too was a case where, after the decree had been passed *ex parte*, the defendants applied to have it set aside. The passage in the judgment relating to this point is to be found at page 92. The learned Judges recognise that proceedings to set aside an *ex parte* decree cannot be said to be proceedings in the suit, the argument having been addressed to them that the submission to jurisdiction must be in the suit, but they think that when the defendants applied to have the *ex parte* decree set aside they must be held to have been ready to accept the decisions of the Courts of that foreign territory, provided always that they were not opposed to natural justice, etc. They themselves think that this is a curious result but that it seems to follow from the decisions upon the point. The only decision actually cited is *Guiard* v. *De Clermont and Donner*[2] and I have not been able to discover that it affords any authority for this view. The case related to an action brought in the Tribunal of Commerce of the Seine, in France. The defendants who were in England declined to appear or to take any part in the proceedings and in the ordinary course judgment by default was passed by that Court. The plaintiff upon this obtained what was equivalent to an attachment order of money at the credit of the defendants in a French Bank, whereupon the defendants applied to the Tribunal of Commerce to have the default judgment set aside, and the Court actually did set it aside. The plaintiffs however appealed and obtained judgment in their favour. That appeal judgment was what was sued upon in England, and, as

1. (1926) I. L. R. 8 Lah. 54. 2. (1914) 3 K. B. D. 145.

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Lawrence, J., points out on page 155, it is clear that it was a judgment to which the defendants were parties and in which they took the chance of obtaining a decision in their favour. This case does not seem therefore to afford support to the proposition that a judgment passed without jurisdiction can by subsequent submission to the Court become executable in British India. The learned Judges who decided *Sheo Tahal Ram* v. *Binaek Shukul*[1] seem to have been inclined to take the same view. They extract from Dicey's "Conflict of Laws" rules regarding jurisdiction in actions *in personam*. So far as it relates to this topic the rule is as follows :—

"Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, *i.e.*, has precluded himself from objecting thereto: (*a*) by appearing as plaintiff in the action, or (*b*) by voluntarily appearing as defendant in such action without protest, or (*c*) by having expressly or implicitly contracted to submit to the jurisdiction of such Court."

As Sulaiman, Ag. C. J., remarks, it would seem that the submission to the jurisdiction must be to the foreign Court itself and probably before the judgment is pronounced; for if there was no such submission the judgment is a nullity. In the present case the alleged submission took place not only after the judgment was pronounced but after the execution petition had been filed and to some extent acted upon. If the decree was, at the time when it was passed, an absolute nullity, I do not think it can seriously be contended that it can have been subsequently and retrospectively clothed with jurisdiction by any such action as the judgment-debtor took in this case. Mr. T. M. Krishnaswami Aiyar has attempted to argue that it was not an absolute nullity in the sense that it nowhere had any validity; for it was a good enough decree within the Travancore State. I do not think that that circumstance makes any difference to the view which should be taken of it in British India. I may quote Lord Selborne who, delivering the judgment of the Privy Council in *Gurdyal Singh* v. *Raja of Faridkot*[2] said:

"In a personal action . . . a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorised by special local legislation) in the country of the forum by which it was pronounced."

1. A. I. R. 1931 All. 689.
2. (1894) L. R. 21 I. A. 171: I. L. R. 22 C. 222: 4 M. L. J. 267 (P. C.).

Narappa Naicken v. Govindaraja Naicken.

I would accordingly hold that the decree in this case continues to be a nullity and therefore inexecutable in British India.

On the further point, whether, if the judgment-debtor's action amounted to a submission, that submission was voluntary, I am inclined to agree with the conclusion of the learned District Judge. I do not find much of assistance in the case-law upon this point. It has been held that submission is not voluntary if the appearance is made only to save property which is in the hands of a foreign tribunal (see *Veeraraghava Ayyar* v. *Muga Sait*[1] which follows the English case of *Voinet* v. *Barrett*[2]). It does not necessarily follow perhaps that where in pursuance of such a decree execution is taken in British India and some constraint imposed upon the judgment-debtor there the submission cannot be voluntary. But if to a 'voluntary act' is attached the ordinary meaning of an act done of a man's own free will and without constraint, it is difficult to bring the respondent's action in resorting to the Quilon Court into this category. It may be true that he could have taken the alternative course of pleading that the decree was without jurisdiction, but if, as we must suppose, he was ignorant that this course was open to him, such ignorance does not, in my view, make his recourse to the Quilon Court any the more voluntary. He must have supposed that the only alternative to undergoing a term of imprisonment was to challenge the decree as he did, and since he acted under pressure of this prospect, I cannot hold that his appearance before the Quilon Court was in the nature of voluntary submission.

I accordingly agree with the lower appellate Court and dismiss this second appeal with costs.

S. R. *Appeal dismissed.*

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1. (1914) I. L. R. 39 Mad. 24; 27 M. L. J. 535.
2. (1885) 55 L. J. Q. B. D. 39.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CURGENVEN.

Akshayalingam Pillai .. *Petitioner* (Petitioner—1st Defendant)*

v.

Avyambalammal and others .. *Respondents (Respondents Nos. 2 to 6—L. Rs. of the 1st Plaintiff and Respondents 11 to 22—Defendants 6 to 17).*

Akshayalingam Pillai *v.* Avyambalammal.

Specific performance—Decree for—Effect of—Right of defendant to enforce—Specific Relief Act (I of 1877), S. 35 (c)—Scope.

A decree for specific performance enures not only for the benefit of the plaintiff but also of the defendant. The passing of the decree does not terminate a suit for specific performance and all the reliefs open to the plaintiff after judgment are equally available to the defendant. The defendant, whether he be purchaser or vendor, is therefore entitled, after judgment, to require specific performance from the unwilling plaintiff in the same action.

Karim Mahomed Jamal v. *Rajooma,* (1887) I. L. R. 12 Bom. 174; *Bai Karimabibi* v. *Abderehman,* (1922) I. L. R. 46 Bom. 990 and *Herambachandra Maitra* v. *Jyotishchandra Singha,* (1931) I. L. R. 59 Cal. 501, followed.

Abdul Shaker Sahib v. *Abdul Rahiman Sahib,* (1922) I. L. R. 46 Mad. 148: 44 M. L. J. 107, referred to.

Where, however, the 1st defendant had, in violation of his contract with the plaintiff, alienated parts of the property to the other defendants, he cannot in equity invoke the aid of the Court to compel the plaintiff to take a conveyance of his (the 1st defendant's) share alone or compel the other defendants against their consent to join in the conveyance to the plaintiff.

The right of rescission recognised in S. 35 (*c*) of the Specific Relief Act is not confined to a vendor, whether plaintiff or defendant, but is equally open to a purchaser whether he appears in the action as plaintiff or defendant.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram, dated the 6th day of November, 1928 and made in I. A. No. 344 of 1926 in O. S. No. 70 of 1923.

C. A. Seshagiri Sastri for petitioner.

K. S. Desikan, R. Somasundaram, K. S. Venkataramani, V. V. Chowduri and *G. S. Venkatarama Aiyar* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—An important question has been raised as to the right of a defendant after judgment in a suit for specific performance.

The facts which gave rise to the application made in the Lower Court, so far as they are relevant to the present purpose, may be briefly stated. The plaintiff-purchaser obtained in

* C. R. P. No. 1112 of 1929. 4th November, 1932.

Akshaya-lingam Pillai v. Avyambal-ammal.

Venkata-subba Rao, J.

O. S. No. 70 of 1923 (that was the suit in which the application was made) a decree for specific performance of the contract referred to in the pleadings, to sell immoveable property. The 1st defendant was the vendor under the contract, and defendants 7, 8 and 13 are alienees of different portions of the property from the 1st defendant with notice of the contract. On the 31st March, 1926, the following decree was made by the Subordinate Judge's Court of Mayavaram:—

1. "That the plaintiff do deposit in Court within six months from this date Rs. 5,500 with interest at 11 annas per cent. per mensem from 17th December, 1913, to date of deposit.

2. That on deposit the 1st defendant on his behalf and on behalf of his sons, defendants 2 to 5 and defendants 7, 8 and 13 do execute and register a conveyance in respect of their respective properties in the plaint (less the items adjudged as lost to the plaintiff by reason of the finding on issue 16); that the deed of conveyance shall be joint or several according as the plaintiff desires and that all costs in connection with the execution and registration of conveyance shall be borne by the plaintiff.

3. That the plaintiff do get possession of the properties with mesne profits to be determined in execution as from the date of deposit of the money, defendants 1, 7, 8 and 13 being severally liable for mesne profits according to the extent of property held by each.

4. That defendants 7, 8 and 13 do have a charge on the money in deposit according to their respective stake on the properties as per their sale deeds obtained by them or their predecessor, their remedies being left to be enforced in future proceedings.

and 5. That the plaintiff do pay 1st defendant Rs. 304-8-0 on account of his costs of the suit and the plaintiff and the other defendants do bear their own costs of the suit as noted below."

It will be noticed that this decree is in some respects somewhat curious. By the time the decree was made, nearly 13 years had elapsed from the date of the contract, and the plaintiff is directed by the decree to bring into Court the purchase-money with interest from 17th December, 1913, the date of the contract. While the plaintiff was thus made liable for interest for over 13 years, there was no corresponding liability imposed on the defendants, who remained in possession of the property, for mesne profits, as under the decree they were made liable only from the date of the deposit. Another curious feature is, that the amount payable to the defendants-alienees was left to be determined in future proceedings. It was felt, it is stated, that this judgment bore harshly on the plaintiff, but as he had died even before it was pronounced, his legal representatives were unable to file an appeal. The amount which under the decree the plaintiff was directed to pay was found to be in excess of the value of the property, and no attempt was therefore made

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by his representatives to carry the decree into effect. The 1st defendant, finding it to his advantage to enforce this decree, presented a petition to the Lower Court in the following terms:

> "that this Hon'ble Court be further pleased to pass a final order in conformity with the preliminary decree already passed in the suit, so as to enable him to reap the fruits of the preliminary decree".

By this petition the 1st defendant stated that he was willing to carry out his part of the contract, and applied that the plaintiff's representatives should be directed to bring the purchase-money into Court. Defendants 7, 8 and 13, it must be noted, did not join the 1st defendant in making this application. The stand taken by the latter in the Lower Court was, that the plaintiff was bound to pay in return for the land in his possession which he was prepared to convey, the proper proportion of the price. But the contention in that form has been abandoned in this Court, the 1st defendant's case now being, that on behalf of the dissenting defendants the conveyance should be executed by the Court and that the plaintiff should be called on to bring in the full price. The learned Subordinate Judge, holding that the only remedy open to the applicant is to have the contract rescinded under S. 35 (*c*) of the Specific Relief Act, made the following order:

> "It seems to me, therefore, that the only final order which can be passed on this application is that the plaint contract, dated 17th December, 1913, evidenced by Exhibit D, be rescinded and determined. I accordingly pass the said order."

It is against this order that the revision petition has been directed.

A question of general importance has been argued whether, when a decree for specific performance is made, it operates in favour of both parties, so that the defendant also can have it carried into effect. It is argued on the one hand that the defendant to the action does not enjoy the same privilege as the plaintiff, that as regards the relief he can obtain in the suit itself, *S. 35 (c) of the Specific Relief Act* prescribes a remedy and that he cannot obtain any other or further relief in the action than what is provided by that section. It is contended, on the other hand, that the decree in the suit enures for the benefit of both and each of the parties can after judgment claim specific performance. The question is, which of these two views is correct? The Specific Relief Act, it has been pointed out, is based on the rules and practice of the English law in

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relation to the doctrine of specific performance: *Ardeshir Mama* v. *Flora Sassoon*[1]. Their Lordships of the Judicial Committee have interpreted the sections of this Act, both as to substantive law and practice, in the light of the principles recognised by the English Courts. If there is an express divergence, then the Act will be strictly adhered to, whatever be the English law (same case, page 623). It seems to be well settled under the English practice that a decree for specific performance operates in favour of both parties. The usual form of a decree is to declare that the agreement ought to be specifically enforced without stating that it shall be so enforced at the instance of the plaintiff only. The form given in Seton on " Decrees " runs thus[2]:

> "Declare that the agreement in the pleadings mentioned, ought to be specifically performed and carried into execution and order and adjudge the same accordingly."

In India also this view was taken in some cases: *Karim Mahomed Jamal* v. *Rajooma*[3] and *Bai Karimabibi* v. *Abderehman*[4]. In a recent case the point was discussed at great length by Rankin, C.J., who, after an elaborate examination of the authorities, came to the same conclusion: *Herambachandra Maitra* v. *Jyotishchandra Singha*[5]. In England a suit for specific performance is not deemed to come to an end by the passing of the decree. In Chapter IV of Fry's standard work on Specific Performance he discusses the various reliefs that may be obtained after judgment. The right to these reliefs is not possessed by the plaintiff alone. The learned author says[6]:

> " It may and not unfrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as, for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase-money. The character of the consequential relief appropriate to any particular case will of course vary according to the nature of the subject-matter of the contract and the position which the applicant occupies in the transaction; but in every case the application must, under the present practice, be made only to the Court by which the judgment was pronounced."

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1. (1928) L. R. 55 I. A. 360: I. L. R. 52 Bom. 597: 55 M. L. J. 523 (P. C.).
2. 7th Edn., Vol. III, pp. 2136 and 2137.
3. (1887) I. L. R. 12 Bom. 174.
4. (1922) I. L. R. 46 Bom. 990.
5. (1931) I. L. R. 59 Cal. 501.
6. S. 1170, 6th Edn.

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and then again,

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself."[1]

Then he goes on to describe at some length the various kinds of relief that are open to a vendor and those open to a purchaser. The nature of the relief depends upon whether the applicant is the vendor or the purchaser, not upon whether he is the plaintiff or the defendant. The chapter deals with varieties of reliefs, and some of them may probably not apply to India, the law and practice here being in some respects different; but there is no reason why the principle, which has been accepted by the English Courts, should be departed from in this country. The Specific Relief Act is defective in this respect, and we should turn for guidance to the English practice on the subject. Let us take the case where the defendant happens to be the purchaser. The plaintiff, who has obtained judgment, makes default. What then is the defendant's position? He is prepared to pay the purchase price and otherwise observe the decree, but on the hypothesis that it does not enure for his benefit, he cannot compel the plaintiff to execute the conveyance. There is no provision in the Specific Relief Act, which such a defendant can invoke. The decisions say that the plaintiff may obtain in certain circumstances an extension of the time originally granted. When then can the defendant feel that he is absolved from the contract? How long is he to keep ready in his hands the purchase-money? It cannot be that the intention of the law is that a defendant-purchaser should be subject to this unmerited hardship. Therefore in the case of a defendant-purchaser at any rate, there being no provision in the Specific Relief Act, we must necessarily turn to the recognised English practice in that respect. Next, is there anything to show that, where the defendant is the *vendor*, the remedy provided by the Act is exhaustive? I may observe first, that S. 35 applies to both the plaintiff-vendor as well as the defendant-vendor and is not confined to the latter case only. Supposing a vendor as plaintiff obtains a decree for specific performance but finds that the defendant is impecunious and cannot pay the purchase-money, why should it not be open to him to have the contract rescinded under that section? And secondly the words "in the same case" in the final paragraph refer to the case mentioned in cl. (*c*). I agree with the view taken on this point in *Kurpal*

1. S. 1171.

v. *Shamrao*[1] and by Thiruvenkatachariar, J., in *Mahommadalli Sahib* v. *Abdul Khadir Saheb*[2]. The opening paragraph of the section refers to the "following cases"; then three cases follow, case (*c*) being one of them. The words "in the same case" in the final clause of case (*c*) must therefore refer to that particular case. And further, why should it be assumed that a departure from the English law is intended and the relief is restricted to the contingency mentioned in the penultimate clause, namely, where the purchaser is in possession? A contrary opinion has been expressed by *Collett* in his *Specific Relief Act* (see Vth Edition, p. 282), and there is a dictum of Kemp, J., to the same effect in *Chathurbuj* v. *Kalyani*[3]; but I must express my respectful dissent from this view. S. 35 thus in my opinion applies to both the plaintiff-vendor and the defendant-vendor, and it enables them to have the contract rescinded in the very action in which the decree for specific performance was made. But is that any reason for holding that the other remedies open to them under the English law are denied to them under the Act? We cannot overlook that the word used in the final clause of S. 35 is "may" and not "shall". It therefore seems to me that a defendant, whether he be purchaser or vendor, must after judgment be in a position to require specific performance from the opposite party in the same action. If the principle on which the rule of mutuality is founded be accepted, the remedies open to the plaintiff after judgment must be equally available to the defendant and the varied nature of the remedies is set forth, as already noticed, by Fry in his work. Thus, the right of rescission recognised in S. 35 (*c*) of the Specific Relief Act is not confined to a vendor, whether plaintiff or defendant, but must be equally open to a purchaser, it being immaterial whether he appears in the action as plaintiff or defendant. That the principle of reciprocity is not limited to the enforcing of the decree by requiring specific performance, is the effect of the observations of Sir Walter Schwabe, C. J., in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[4]. The learned Chief Justice gives a rough summary of the remedies enumerated by Fry, as they obtain in the English system and assumes that they are

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1. (1922) I. L. R. 47 Bom. 589.
2. (1927) 59 M. L. J. 351 at 357.
3. A. I. R. 1927 Bom. 239.
4. (1922) I. L. R. 46 Mad. 148: 44 M. L. J. 107.

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equally available to either party in this country. This in my opinion is the necessary result of the acceptance of the dual principle recognised in the English law: first, that the passing of the decree does not terminate the suit but that various reliefs may be obtained after judgment in the action itself (according to Sir Walter Schwabe, C.J., the decree is in the nature of a "preliminary decree"), and secondly, that the decree enures not only for the benefit of the plaintiff but also of the defendant. Mr. Seshagiri Sastri suggested (though on the facts of this case it was not necessary for him to take up this position) that in regard to limit of time, applications by a defendant to enforce the decree would be governed by the provisions of the Limitation Act. It is sufficient to point out that this does not seem to be the true principle on which relief is granted to either party, but this subject I need not pursue further.

I have so far assumed that the decree that is passed has followed the proper form, *i.e.*, that it directs the contract to be specifically enforced—the words being wide enough to apply to the plaintiff as well as the defendant. If as in the present case the decree has not followed that form, it is a matter of detail, whether the Court before granting relief to the defendant would insist upon the decree being in the first instance amended. In any case it would be advisable for the Courts to follow the English form in framing specific performance decrees and further by way of caution to insert, as suggested by Sir Walter Schwabe, some such words as "further consideration reserved" at the end of the decree.

In the result, the contention of Mr. Seshagiri Sastri that a defendant can enforce specific performance is in my opinion well-founded. But the question still remains, can the 1st defendant in the circumstances of this case obtain such a relief? The plaintiff is neither in law nor under the decree bound to take a conveyance of the 1st defendant's share alone Can the latter then compel defendants 7, 8 and 13 against their consent to join in the conveyance? They were not, it must be noted, parties to the contract, but the Court, giving effect to a rule of equity, held that they were bound at the instance of the plaintiff. The 1st defendant in violation of his contract with him alienated parts of the property to these defendants. As against the plaintiff no doubt, they may have no equities, but surely the

1st defendant cannot be allowed to perpetrate a double wrong. His conduct towards the plaintiff was wrongful, and he now invokes the aid of the Court to undermine the position of the alienees to whom he professed to pass a good title. The Lower Court, by way of affording a relief to him, rescinded the contract under S. 35, and in my opinion he is not entitled to any higher or further relief.

I may mention that almost at the close of the case it was intimated to us that the 13th defendant had died subsequent to the appeal and his legal representatives had not been brought on the record. This, in the view I have taken, is immaterial.

In the result, the Civil Revision Petition is dismissed with costs.

Curgenven, J.

Curgenven, J.—I agree that this Civil Revision Petition should be dismissed, but I would like briefly to put my reasons for that view in my own words.

Accepting the general proposition that a decree for specific performance may be enforced by the defendant where the plaintiff has not chosen to give effect to it, and even regarding the decree in the present case, in spite of its actual form, as amenable to such treatment, I have not been persuaded that, in such circumstances as the present, the Court would be bound to comply with the 1st defendant's (petitioner's) request. The agreement to sell was in 1913, and nearly six years later, in 1919, the 1st defendant parted with certain portions of the property to the 7th, 8th and 13th defendants. They were aware of the agreement, but it seems to have been represented to them that the plaintiff had no intention of carrying it out. Now, since the 1st defendant cannot enforce the decree so far only as his own property is concerned, enforcement must entail deprivation, at his instance, of the property which these defendants acquired from him. However the equities may stand between these persons and the plaintiff, it appears to me repugnant to all principles of equity that the 1st defendant should now enforce the decree against their interests and without their consent, thereby depriving them of the title which he had himself conveyed to them. Had he himself sued the plaintiff for specific performance after making these alienations, I do not think that any Court would have given him a decree; and I am loth to believe that, now that the plaintiff has a decree, the 1st defendant may get indirectly what he could not get directly.

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and the Court has no discretion to refuse to give it operation at his instance. Such enforcement may not technically amount to execution, but it appears to me that, where only one of several defendants applies, there must necessarily be a power in the Court such as, in execution, is supplied by O. 21, R. 15, Civil Procedure Code, to safeguard the interests of the remainder. Were this not so, it would have been open to this petitioner to dispose of all but a few cents of the property and yet compel the unwilling holders of the remainder, not to speak of the equally unwilling plaintiff, to become parties to a sale. I do not think that, even had we in this case strictly to administer the law, the doctrine of the reciprocal enforceability of decrees for specific performance would need to be applied in so unqualified a manner. *A fortiori* it follows that this petition for revision must be dismissed.

S. R. —— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD MACMILLAN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Raja Raghunandan Prasad Singh and another .. *Appellants**

v.

The Commissioner of Income-tax, Bihar and Orissa .. *Respondent.*

P. C.

Raja Raghunandan Prasad Singh *v.* The Commissioner of Income-tax, Bihar and Orissa.

Income-tax Act (XI of 1922), S. 4—"Interest arising or accruing"—Substitution of a new mortgage for an existing debt—Arrears of interest outstanding on previous mortgage, whether deemed realised when new mortgage granted—Interest not taxable until mortgage realised by sale of property in execution of mortgage decree.

A mortgagee, carrying on a money-lending business, accepted a new mortgage in July, 1904, for a capital sum representing the principal and arrears of interest then due under a previous mortgage of 1894, thereby discharging the old mortgage. The mortgagee's accounts, kept on a cash basis, did not show the arrears of interest as realised in the year 1904. In December, 1917, the mortgagee obtained a decree on the mortgage of July, 1904, and in execution thereof the mortgaged property was purchased by the mortgagee-decree-holder himself (with the permission of the Court) in November, 1924 and January, 1925 and the sales confirmed by the Court in December, 1925.

Held, that for purposes of assessment to income-tax, the interest must be deemed to have been received and realised by the mortgagee, not when the new mortgage of 1904 was granted, nor at the date of the Court-sale, but on the date when the sale was confirmed by the Executing Court under O. 21, R. 92, Civil Procedure Code.

The transaction of 1904 was in effect the substitution of a further and better security for the old, and the mortgagee did not by virtue of that

*P. C. Appeal No. 18 of 1931. 24th January, 1933.
Patna Appeal No. 49 of 1929.

P. C.

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transaction receive payment then and there of the arrears of interest outstanding on the previous mortgage, and he was not therefore liable to be taxed on this sum as being income received when the new mortgage was granted; the sum representing the arrears of interest (though after 1904 secured by the new mortgage) continued to retain its character as such down to the time of the judicial sales, and when the mortgagee as the result of the judicial sales received payment in account of the sum due under the mortgage of July, 1904, he then received payment for the first time of the arrears of interest included in that sum.

Held, accordingly, that the sales having been confirmed and become absolute in December, 1925, the mortgagee was liable to pay income-tax for the year 1926-27 on the arrears of interest as being profits or gains of his money-lending business in the previous year 1925-26.

Californian Copper Syndicate v. *Harris*, (1905) 6 F. 894: 5 T. C. 159; *Royal Insurance Co., Ltd.* v. *Stephen* (1928) 44 T. L. R. 630: 14 T. C. 22 and *Westminster Bank, Ltd.* v. *Osler*, (1933) A. C. 139, distinguished.

Judgment of the High Court, Patna, (I. L. R. 9 Pat. 48), affirmed.

Appeal No. 18 of 1931 from a judgment of the High Court, Patna, dated the 7th August, 1929, upon a reference of questions made to the High Court by the Commissioner of Income-tax, Bihar and Orissa.

De Gruyther, K. C. (with *G. D. McNair*) for appellants.

Dunne, K. C. (with *Reginald Hills*) for respondent.

24th January, 1933. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—This appeal brings before their Lordships eight questions relating to the taxable income of the appellants for the year 1926-27. The appellants carry on the business of money-lenders and are liable under S. 3 of the Indian Income-tax Act, 1922, to pay income-tax for the year 1926-27 in respect of the profits or gains of their business in the previous year, 1925-26, as computed in accordance with the provisions of S. 10 of the Act.

Being dissatisfied with the assessment of the Income-tax Officer and with the result of an appeal to the Assistant Commissioner, the appellants under S. 66 (2) required the Commissioner to refer to the High Court of Judicature at Patna a series of questions purporting to be questions of law arising out of the Assistant Commissioner's order. The Commissioner accordingly, as directed by the Act, drew up a statement of the case and referred it to the High Court with his own opinion on the eight questions which he formulated.

The transactions which have given rise to the questions at issue relate to the lending of money by the appellants or their

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predecessor (hereinafter called "the assessees") in connection with a property known as the Srinagar estate. It appears that on the death of the proprietor of this estate in 1880 a one-third share thereof was in a partition suit awarded to his son Nityanand and the other two-thirds jointly to Kamlanand and Kalikanand, his sons by another wife. In 1894 Nityanand mortgaged his one-third share to the assessees for two lakhs of rupees. Five years later he borrowed on further mortgage of his share a sum of three and a half lakhs from the Benaili Rajas. On this latter mortgage the Benaili Rajas obtained in 1902 a decree against Nityanand for Rs. 4,57,159, principal and interest. His half-brothers in 1903 bought this mortgage decree for five lakhs and in security of the purchase price mortgaged their two-thirds of the Srinagar estate to the Benaili Rajas. In the same year they purchased Nityanand's equity of redemption.

In July, 1904, there was due to the assessees under the mortgage of 1894 a sum of Rs. 4,33,135, being Rs. 2,00,000 of principal and Rs. 2,33,135 of interest, and to the Benaili Rajas under the mortgage of 1903 a sum of Rs. 5,25,815. The debtors, Kamlanand and Kalikanand, settled with the Benaili Rajas by paying them Rs. 815 from their own cash, and Rs. 3,00,000 borrowed from the assessees and by executing a fresh mortgage for the balance of Rs. 2,25,000 in favour of the Benaili Rajas. This left them indebted to the assessees to the extent of Rs. 4,33,135 + Rs. 3,00,000 = Rs. 7,33,135, for which sum they, along with Kamlanand's two minor sons, through him as their guardian, executed on 18th July, 1904, a mortgage on the Srinagar estate in favour of the assessees.

In 1912 there was due on the mortgage for Rs. 2,25,000 to the Benaili Rajas a sum of Rs. 3,34,000, and this was met by Kalikanand as *karta* of the joint family, borrowing three lakhs on mortgage from the assessees on 7th November, 1912, and providing the balance of Rs. 34,000 in cash. The Benaili Rajas were thus finally paid off.

The assessees subsequently brought suits on the mortgage for Rs. 7,33,135 of 18th July, 1904, and the mortgage for Rs. 3,00,000 of 7th November, 1912, on which, taken together, a sum of Rs. 27,13,379 of principal and interest was due. Decrees were passed in favour of the assessees on 22nd December, 1917. The mortgaged property was put up for sale

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and was bought by the assessees at the price of Rs. 25,65,100 at Court sales on the 19th November, 1924, and the 31st January, 1925. The sales were confirmed on the 18th and 21st of December, 1925.

The general question arising may be said to be—How much, if any, of this sum of Rs. 25,65,100 is liable to income-tax in the year 1926-27 as being profits or gains of the assessees' money-lending business for the year 1925-26? The assessees, it is important to bear in mind, keep their accounts on a cash basis.

Their Lordships propose to deal with the eight particular questions stated by the Commissioner in the order in which he has numbered them, although this may not be the most logical sequence and it has not been followed in the judgment of the High Court.

The first question is thus formulated by the Commissioner:

"1. When a bond is discharged and extinguished by a fresh bond and where the assessees have credited the principal and interest of this bond in their books of accounts, can notional interest on the first bond be said to arise in years subsequent to the execution of the second bond, and can it be charged to income-tax subsequently?"

Their Lordships deprecate the statement of questions of law in this abstract form divorced from the facts of the particular case. The real question is whether, when the assessees on 18th July, 1904, accepted a new mortgage for Rs. 7,33,135, representing to the extent of Rs. 2,33,135 the arrears of interest due under a previous mortgage of 14th June, 1894, and discharged the previous mortgage and all sums due thereunder, they thereby in effect received payment then and there of the arrears of interest due under the previous mortgage.

The assessees contended that the acceptance of the new mortgage in 1904 and the extinction of the previous mortgage operated payment of the arrears of interest due under the previous mortgage, which were included in the capital sum for which the new mortgage was granted; and that the sum representing the arrears of interest should have been taxed, if at all, as a receipt of the year 1904 in which the new mortgage was granted. According to the Commissioner, the assessees were as a matter of fact assessed at the time in the amount of these arrears of interest, but the assessment was, on the appeal of the

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assessees, discharged on the ground that the interest was not taxable until the mortgage was realised. As, under S. 34 of the Act, income which has escaped assessment in any year can be subsequently assessed only within one year from the end of that year, the assessees have now an obvious reason for reversing the contention which they appear to have successfully put forward on the previous occasion. The Commissioner further finds that the sum of Rs. 2,33,135 was "not shown separately as interest realised in the assessees' books of account of that year [*i.e.*, 1904] either in the interest account or in the personal account of the debtor"—a finding which seriously stultifies the question as framed by the Commissioner.

Their Lordships fully recognise that income may be received in kind as well as in cash and that the receipt of an equivalent of cash may be a receipt of income. In the case of *Californian Copper Syndicate* v. *Harris*,[1] a company which dealt in mining properties sold certain property for fully-paid shares in another company and was held to be liable to income-tax on the profit made on the transaction although no cash passed, but this was on the ground that the shares taken in exchange were realisable and were thus money's worth and the equivalent of cash. In the case of *The Royal Insurance Company, Ltd.* v. *Stephen*,[2] an insurance company, which admitted that any profit which it made on the realisation of investments was liable to tax, effected an exchange of securities in pursuance of a railway amalgamation scheme. The new stocks received in place of the surrendered stocks had at the date of the exchange a definite market value which was less than the original cost to the company of the surrendered stocks. A claim was made by the company in computing its profits to deduct the difference as a loss sustained by it. For the Crown it was contended that there has been no realisation of investments, but merely an exchange of one set of investments for another. The company's claim was upheld by Rowlatt, J., on the ground that it had in substance realised its former holdings and received for them money's worth of a definite amount. The loss was thus a realised loss susceptible of exact estimation in money. The transaction was on "a money basis". Reference may also be made to the recent case

1. (1905) 6 F. 894: 5 T. C. 159.
2. (1928) 44 T. L. R. 630: 14 T. C. 22.

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in the House of Lords of *Westminster Bank, Ltd.* v. *Osler*[1] where the bank surrendered certain holdings of National War Bonds in exchange for other Government securities and the Crown claimed tax on the excess value of the substituted over the original securities. The question was whether these transactions were the equivalent of a realisation of the original holdings, and it was held that they were. "The exchange effected in the present case," said Lord Buckmaster, "was in fact the exact equivalent of what would have taken place had instructions been given to sell the original stock and invest the proceeds in the new security". The bank had thus in effect realised its profit, for it had received it in money's worth of a definitely ascertained amount. From these cases it is plain that the essence of the matter is that there must be an actually realised or realisable profit or loss.

Applying this principle to the assessees' transaction in 1904, their Lordships are of opinion that there was in the circumstances no realisation of the principal and interest of the original mortgage of 1894 and that when the assessees received the new mortgage for Rs. 7,33,135, which included the principal and interest of the original mortgage, they did not thereby receive payment or the equivalent of payment of the principal and interest of the original mortgage. No doubt the grantors of the new mortgage were not identical with the grantor of the original mortgage and the property mortgaged was greater in extent, but the substitution effected cannot in any real sense be described as the equivalent of a realisation of the original mortgage, principal and interest. What happened was that the assessees received a new and substituted security for an existing debt. To give security for a debt is not to pay a debt If the assessees had received payment in kind of the amount outstanding on the original mortgage, in the shape, say, of realisable shares or bonds, the case would have been different, but they merely received further and better security for their debt. It is, in their Lordships' view, quite immaterial that the assessees discharged the original mortgage and all liability under it, for that was merely an incident in the transaction whereby the new security was substituted for the old. Their Lordships accordingly hold that the assessees did not by virtue

1. (1933) A. C. 139.

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of the transaction of 1904 receive payment of the arrears of interest amounting to Rs. 2,33,135 then outstanding on the mortgage of 1894; that the assessees were not liable to be taxed on this sum as being income received when the new mortgage was granted; and that this sum of arrears of interest (though after 1904 secured by the new mortgage) continued to retain its character and remain due to the assessees down to the time of the judicial sales of November, 1924, and January, 1925. In so holding their Lordships find themselves in agreement in result with the Commissioner and the High Court.

The next question is unfortunately also stated in abstract form as follows:—

"2. When a property is purchased in execution of a mortgage decree by the mortgagee subject to deposit of security sufficient to safeguard the interest of a party claiming a one-eighth share in the property to be unaffected by the decree, can the value of the whole property be taken into account for the purpose of computing profits, or, on the other hand, can the amount deposited in the Court as security in these circumstances be claimed as deductible expenditure in computing profits?"

The facts are that in 1923 Ghananand Singh, a minor son of Kalikanand, sued the assessees for a declaration that his one-eighth share of the Srinagar estate was not affected by the mortgage decrees obtained by the assessees on 22nd December, 1917. Pending a decision in this suit the assessees deposited in Court Rs. 3,20,633, being one-eighth of the purchase price of Rs. 25,65,100, at which they bought the property at the judicial sales. The Subordinate Judge pronounced a decree in favour of Ghananand Singh on 15th September, 1927. It is not stated whether an appeal was taken. The question is whether, on the assumption that any part of the purchase price of Rs. 25,65,100 at which the assessees bought the Srinagar estate is computable as income of the assessees in the year 1925-26, it is permissible to deduct from such part the amount of this deposit of Rs. 3,20,633.

The dates are important. It will be observed that the suit was brought in 1923, while the judicial sales at which the assessees purchased the property took place at the end of 1924 and beginning of 1925. The assessees were thus aware when they bid for the property that there was a possibility that they might in the event only obtain seven-eighths of it. They were nevertheless prepared to bid Rs. 25,65,100 for it. Had it not been for this risk they would presumably have given more for the property. In the next place, no decision was pronounced in

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the suit till 15th September, 1927, and until then the assessees could not say whether or not they would have to pay over the amount of the deposit to Ghananand Singh, and if an appeal was taken the question would continue to remain in suspense. In these circumstances their Lordships are unable to see how in computing the profits or gains of the assessees' business for the year 1925-26 this deposit can legitimately be claimed as a deduction from the purchase price of the Srinagar estate or from such part of that purchase price as may be held to be an income receipt. It was not in its nature a deduction from the purchase price, for the purchase price was paid in the knowledge of the claim; nor was it a sum actually expended in the year 1925-26, so as to be a debit in that year in the books of the assessees, which are kept on a cash basis, for it was then at most a contingent liability; and in no respect does it answer the description of expenditure incurred in the year 1925-26 by the assessees solely for the purpose of earning the profits or gains of that year within the meaning of S. 10 (2) (*ix*). Their Lordships accordingly agree with the Commissioner and the High Court that the amount of the deposit is not a permissible deduction in the computation of the assessees' profits or gains for the year 1925-26.

The third question stated by the Commissioner is in the following terms:—

"3. Can assessees claim as admissible deduction from their income of that year the amount of decree obtained against them by a subsequent mortgagee who has subsequently been held by the Courts to hold a prior mortgage over the property, and is the sum which eventually turns out to be a charge on the property purchased by the assessees in a mortgage decree (which sum had not been considered by the assessees to be such charge on account of an express covenant embodied in an original mortgage bond) an allowable deduction from taxable income in this case?"

Here the facts are that the Benaili Rajas in 1923 sued the proprietors of the Srinagar estate and the assessees to recover the amount due on a mortgage of the estate, dated the 29th April, 1910. On the 18th September, 1926, the Rajas obtained a decree in their favour for Rs. 1,50,818, which the Court held to be a valid and prior charge on the property purchased by the assessees.

It will be observed in this instance also that the assessees purchased the property at the judicial sales in 1924-25 in the full knowledge of the Rajas' claim and in bidding Rs. 25,65,100 presumably allowed for the possibility of this claim succeeding,

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as it ultimately did. Moreover, in the year 1925-26 the assessees made no expenditure of Rs. 1,50,818 and it was not till the 18th September, 1926, that this sum was declared to be a charge on the property purchased by the assessees. Their Lordships accordingly, for the reasons assigned in disposing of the preceding question, are of opinion that this sum of Rs. 1,50,818 is not a permissible deduction in the computation of the assessees' profits or gains for the year 1925-26, and in this result they agree with the Commissioner and the High Court.

On the fourth question no argument was offered by the assessees. Their Lordships are accordingly not called upon to deal with it, and the decision of the Commissioner and the High Court, which was adverse to the assessees, will stand.

The fifth question stated by the Commissioner is as follows:—

"5. Does the law contemplate taxation of notional receipts of income and profits arising from the purchase by the mortgagee of the mortgaged property? Is not a purchase by the mortgagee of the mortgaged property sold in execution of a decree a capital transaction?"

This is logically the first question for determination between the parties, for if no part of the price of Rs. 25,65,100, at which the assessees acquired the Srinagar estate, can be treated as an income receipt, the other questions would not appear to arise.

When a mortgage decree-holder, with the permission of the Court, bids for and purchases the mortgaged property at a judicial sale, O. 21, R. 72 (2) of the Civil Procedure Code provides that "the purchase money and the amount due on the decree . . . may be set off against one another and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly." The decree-holder thus in effect receives a transfer of the property at the value of the purchase price in satisfaction *pro tanto* of the liability of the mortgagors for principal and interest. So far as the purchase price exceeds the principal sum due under the mortgage the excess is applicable to any arrears of interest. The costs of the mortgage suits and the expenses of the sales may for the purposes of the argument be disregarded. To the extent, therefore, that the purchase price exceeds the principal sum due there is a realisation of interest—that is, a payment of interest. The

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interest is paid in the form of a credit in account and is reinvested in the purchase of the property.

In the present instance the principal sums due under the mortgages of 18th July, 1904, and 7th November, 1912, on the Srinagar estate when it was judicially sold amounted to Rs. 7,33,135 + Rs. 3,00,000=Rs. 10,33,135. The price paid was Rs. 25,65,100, or Rs. 15,31,965 in excess of the principal sums due. This excess was plainly available to be set against the arrears of interest, costs and expenses. But the special question which arises is whether in the circumstances a further sum is attributable to interest, *viz.*, the sum of Rs. 2,33,135, which on 18th July, 1904, was due as arrears of interest under the former mortgage of 14th June, 1894, and which was included in the principal sum of Rs. 7,33,135, for which the mortgage of 18th July, 1904, was granted.

Their Lordships, in disposing of the first question in the case, have decided that this sum of Rs. 2,33,135 of arrears of interest was not paid in 1904, and they are of opinion that when the assessees as the result of the judicial sales received payment in account of the sum of Rs. 7,33,135 due under the mortgage of 18th July, 1904, they then received payment for the first time of the arrears of interest included in that sum. To the extent of Rs. 2,33,135, therefore, the sum of Rs. 7,33,135 represented an income receipt and must, as already indicated, be brought into computation as such by the assessees for tax purposes.

On the general issue raised in this fifth question their Lordships accordingly find themselves in agreement with the answer given by the Commissioner and the High Court. The special point with which their Lordships have just dealt is a corollary to the answers to the first and fifth questions and the decision given upon it below will be affirmed.

The next question is thus stated by the Commissioner:—

"6. If the profits or gains arising to the assessees from the buying in of mortgaged property are taxable, what is the date on which the profits are deemed to have arisen? Is it the date of decree, the date of sale, the date of confirmation of sale, or the date of delivery of possession?"

The answer of the Commissioner and of the High Court was that the profits must be deemed to have arisen on the confirmation of the sales, *i.e.*, on the 18th and the 21st December, 1925, and their Lordships are of the same opinion. The decree

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is only a step towards realisation, and the date of the decree is therefore plainly not the date of realisation. Nor on the date of the sale does the purchaser obtain an indefeasible right, for under O. 21, Rr. 89, 90 and 91, the sale may be set aside on various grounds. It is only where no application is made under these rules or where such application is made and disallowed that the Court under O. 21, R. 92 makes an order confirming the sale, whereupon " the sale shall become absolute".* It is then that the process of realisation is completed and any profit or income is realised by the decree-holder. This is so whether the property is purchased by the decree-holder himself or by a third party, for the right of set-off conferred on the purchasing decree-holder must also be dependent on the sale being rendered absolute by confirmation*. No doubt S. 65 of the Code provides that " where immovable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute," but this provision does not come into operation unless and until the sale has become absolute. The actual date of realisation is not affected by this retrospective vesting of the property.

The seventh question formulated by the Commissioner is as follows:—

> " 7. Assuming that there are profits arising out of this transaction which are legally taxable, are the assessees entitled to deduct from these taxable profits expenses which are always entailed in taking delivery of possession and effecting mutation in the Collectorate Registers?"

Their Lordships agree with the Commissioner and the High Court that the expenses incurred by the assessees in completing their title and entering into possession after the sales had become absolute are not deductible by the assessees from their taxable profits. The assessees in bidding for the property must have had in view that they would incur these expenses if they were the successful purchasers and doubtless estimated accordingly the price which they thought it worth their while to bid.

The eighth and last question is as follows:—

> "8. What is the correct method of computing the value of the property acquired by the assessees in this case?"

**See* O. 21, R. 72, cl. (2), Civil Procedure Code.—K. J. R.

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It appears that the Civil Court Commissioners had valued the property before the sales at Rs. 17,13,701, and the assessees' contention was that it should be taken at this value instead of being taken at the value of Rs. 25,65,100, the price at which they acquired the property at the sales. Their Lordships, agreeing with the Commissioner and the High Court, are of opinion that the price which the assessees bid for the property at the public sale must be taken to be its market value, and there is no evidence to the contrary.

As their Lordships find themselves in the result in agreement with the answers given by the High Court to the several questions raised in this appeal, they will humbly advise His Majesty that the decree of the High Court of 7th August, 1928, be affirmed and the appeal dismissed. The respondent will have his costs of the appeal.

Solicitors for appellants: *W. W. Box & Co.*

Solicitor for respondent: *The Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD THANKERTON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Musammat Bahu Rani and another .. *Appellants**

v.

Thakur Rajendra Bakhsh Singh .. *Respondent.*

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Hindu Law—Joint family—Separate or joint property—Maintenance grants by Government in favour of two brothers, members of a joint family—Joint tenancy not thereby created—Each brother takes as tenant-in-common an estate of inheritance.

The principle of the English Law of joint tenancy is unknown to Hindu Law, except in the case of the joint property of an undivided Hindu family governed by the Mitakshara Law, which under that law passes by survivorship: *Jogeswar Narain Deo* v. *Ram Chund Dutt,* (1896) L. R. 23 I. A. 37: I. L. R. 23 C. 670: 6 M. L. J. 75 (P.C.), followed.

With regard to certain maintenance grants made by the Government in favour of two brothers (who were members of a joint Hindu family) "and their heirs, successors and assigns," *held*, that in any view of the case, the grants could not operate to create a joint tenancy as opposed to a tenancy in common. The question whether these grants were made to the two brothers severally or as members of a joint family, depended on the intention of the

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*P. C. Appeal No. 75 of 1930. Oudh Appeal No. 14 of 1929. 12th January, 1933.

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donor as expressed in the grants. *Prima facie* a gift to a member of a joint Hindu family is his separate property and will only become joint family property when it descends to his sons, unless the donee himself has made it joint family property by throwing it into the common stock.

Held, (on the construction of the grants) that the brothers did not take as members of a joint Hindu family, but each took the property granted as his separate property, *i.e.*, the grants conferred an estate of inheritance on each of the two brothers in the subject-matter of the grant.

Appeal No. 75 of 1930 from a decree, dated the 29th April, 1929, of the Chief Court of Oudh, (on its Appellate Side), varying a decree of a single Judge of the same Court, dated the 16th February, 1928.

The question for decision on the appeal was, whether the appellant, Mst. Bahu Rani, had acquired an absolute proprietary title to the property in dispute by adverse possession, and this question turned on the construction of certain maintenance grants made by the Government to two brothers in the years 1871-77. The learned Trial Judge held that the grants conferred a tenure of joint tenancy on the two brothers with a right of survivorship *inter se*, and that the possession of the appellant (the widow of one of the brothers) of the half share of the tenure was therefore without any title and adverse. The Court of appeal, differing from the Trial Judge, held, on the construction of the grants, that they conferred an estate of inheritance on each of the grantees, and the appellant Mst. Bahu Rani, having entered into possession as heiress of her deceased son, her possession could not be adverse.

Against the said decree of the Chief Court, on its Appellate Side, the present appeal was preferred to His Majesty in Council.

De Gruyther, K. C. (with *Wallach*) for appellants.—A gift to two brothers, members of a joint family, without indicating that they were to take as tenants-in-common, constitutes a gift in joint tenancy: *Mankamna Kunwar* v. *Balkishan Das*[1]. On this construction of the grants, the appellant's possession was clearly adverse: *Chaudhri Satgur Prashad* v. *Raj Kishore Lal*[2] and *Sham Koer* v. *Dah Koeri*[3].

Sir Dawson Miller, K. C., Dunne, K. C. and *M. A. Jinnah* for respondents were not called upon to argue.

12th January, 1933. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—The plaintiff instituted this suit in the Chief Court of Oudh for a declaration that he was the adopted

1. (1905) I. L. R. 28 All. 38.
2. (1919) L. R. 46 I. A. 197: I. L. R. 42 All. 152: 38 M. L. J. 259 (P.C.).
3. (1902) L.R. 29 I. A. 132: I. L. R. 29 C. 664 (P. C.).

son of Mahabir Bakhsh Singh, and that the deed of gift executed by the 1st defendant, who is the widow of Mahabir's elder brother, Mahesh Bakhsh Singh, in favour of the 2nd defendant, was not binding beyond her own lifetime. As the valuation of the suit proved to be under five lakhs of rupees it was insufficient to give the Oudh Chief Court original jurisdiction, and the plaint was amended by claiming reliefs as to other properties as well, but these claims are not the subject of this appeal as they failed before Pullan, J., the Trial Judge, and were given up at the hearing of the appeal in the Chief Court. Pullan, J., gave the plaintiff a declaration as to the adoption, and otherwise dismissed the suit. The Chief Court modified this decree by giving the plaintiff a declaration as to the deed of gift as well. From this decree the defendants have preferred the present appeal.

The following pedigree will help to show how the suit arose:—

RAJA HARDAT SINGH.

- Mahesh Bakhsh Singh (died 1896). = Bahu Rani, Defendant No. 1.
  - Swami Bakhsh Singh (died 1899).
- Mahabir Bakhsh Singh (died 1905). = Mahadei Kuar.
  - Rajendra Bakhsh Singh, Plaintiff. He alleges that he is Mahabir Bakhsh Singh's adopted son, which allegation is denied by the defendants.

Hardat Singh, the Rajah of Bondi, having taken an active part in the Mutiny, his estates, which had been confiscated under Lord Canning's Proclamation, were not restored to him, but were granted to the Maharaja of Kapurthala in consideration of his services, subject to the payment of a maintenance allowance of Rs. 250 a month to Hardat Singh's sons, Mahesh Bakhsh Singh and Mahabir Bakhsh Singh.

Subsequently, in the years 1871 and 1875, the Government granted the two brothers the seven villages, which are the subject of this appeal and are Nos. 2 to 8 in Schedule I of the plaint by three grants, the terms of which are set out in the Certificate of the 22nd August, 1877.

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The limitation in the grant of villages Nos. 2 to 4 of the 5th June, 1871, was to "you and your heirs," and subject to the due observance of the conditions of the grant the Government undertook to " maintain you and your heirs as proprietors of the above-mentioned estate ".

The grant of village No. 5 in the same year was limited to the two brothers "their heirs, executors, administrators and assigns in full hereditary and transferable proprietary right".

The grant of villages Nos. 6 to 8, dated the 22nd August, 1877, was limited to the two brothers "and their heirs, successors and assigns".

It is recited in the first grant that the Government had sanctioned a grant of five thousand acres of waste land to the two brothers for their maintenance and these villages were apparently substituted, as appears from a provision in the third grant for the surrender by the two brothers of the waste lands in their possession.

Mahesh Bakhsh Singh, the elder brother, was *lambardar* and manager of the estate until his death in 1896. Mutation of names was then effected as regards his share in favour of his minor son Swami Bakhsh Singh, and his surviving brother Mahabir Bakhsh Singh became *lambardar* and manager and so continued until his death in 1905.

The minor Swami Bakhsh Singh died in 1899, and on his death mutation of names was effected in favour of his mother Babu Rani, the 1st defendant in this case, with the consent of her brother-in-law Mahabir Bakhsh Singh, whose name was entered as manager. So far had everything proceeded on the footing that Mahesh Bakhsh Singh's share was his separate property and had descended on his death to his minor son Swami Bakhsh Singh and on his death to his mother, the 1st defendant, for her life with reversion to her husband's heirs.

On the 15th May, 1900, Mahabir Bakhsh Singh adopted the plaintiff conferring upon him the name of Rajendra Bakhsh Singh, and on the following day he executed a deed of adoption and a will by which he left his property to his wife Mahadei Kuar with remainder to his adopted son, the present plaintiff. On the same day the 1st defendant Bahu Rani also executed a will in the plaintiff's favour in which it was recorded that the adoption had been made in consultation with her and with her consent.

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On Mahabir's death in 1905 Bahu Rani, as the widow of elder brother, became *lambardar* and manager. Subsequently the widows fell out and in September, 1906, Mahadei Kuar, Mahabir's widow, applied that the Court of Wards should take over the estate, alleging that it was joint family property and that on Swami Bakhsh's death his share had passed by survivorship to Mahabir; she also alleged that Bahu Rani, the 1st defendant, had been mismanaging and wasting the estate. This application was rejected, and the 1st defendant continued to be *lambardar* of the whole estate until 1909 when a partition was effected by the Revenue authorities.

On the 12th February, 1907, the 1st defendant executed a second will by which she left all her property to the 2nd defendant, and on the 6th April, 1926, she executed in favour of the 2nd defendant a deed of gift of her share in the seven villages which were the subject of these grants and put him in possession. In this deed it was alleged that the present plaintiff neither had been nor could have been adopted by Mahabir Bakhsh Singh.

The plaintiff then instituted the present suit on the 3rd May, 1927, for a declaration that his adoption was valid and that the deed of gift executed by the 1st defendant in favour of the 2nd defendant was not binding beyond her own lifetime.

The written statements of the defendants alleged that there was a family custom prohibiting adoption, that the plaintiff had not been validly adopted, and that he was incapable of being adopted because his remote ancestor Sangaram was illegitimate as his mother was a Brahmin lady whom his father Harihar Deo could not lawfully marry. They also alleged that the suit villages were joint family property; that on the death of Swami Bakhsh Singh his share therein passed by survivorship to his uncle, Mahabir Bakhsh Singh, but the 1st defendant from the date of her son's death asserted her proprietary and adverse right to a one-half share in the said villages and had acquired title thereto by adverse possession.

The Trial Judge held that a family custom prohibiting adoption had not been proved and this finding was not questioned before the Chief Court. As regards the validity of the adoption both Courts held that the plaintiff had been duly

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adopted and that it was not shown that the adoption was invalid as a double adoption by both Mahabir and his brother's widow, the 1st defendant, a case set up by the defendants at the trial. As regards alleged illegitimacy of the plaintiff's ancestor, they held it not proved that he was son of Harihar Deo by a Brahmin lady, and that even if he were, it was shown that the plaintiff's family were recognised as of good caste. These concurrent findings dispose of the question of adoption.

The question of the defendants' title by adverse possession was the subject of issues 5 and 8—

5. Were the villages 2 to 8 in Schedule I granted to Mahesh Bakhsh Singh and Mahabir Bakhsh Singh (*a*) as tenants-in-common, (*b*) as members of a joint Hindu family.

8. Has the defendant No. 1 become the absolute owner of the properties 2 to 8 in Schedule I by adverse possession?

Pullan, J., was of opinion that, as at the dates of the grants the two brothers constituted a joint family, the grant must be taken to have been made to them jointly as members of a joint family.

The limitations in the grants themselves which have been set out above he treated as a mere form and nothing more, which could not be taken as subversive of the ordinary rules of succession under the Hindu Law. Accordingly he held that on the death of Swami Bakhsh Singh in 1899 his share passed by survivorship to his uncle, Mahabir Singh, and that the 1st defendant had acquired a title thereto by adverse possession for more than twelve years, and rejected the plaintiff's claim to a declaration in respect of them.

On the plaintiff's appeal to the Chief Court it was contended for the defendants that the grants must be taken to have been made to a joint family consisting of the two brothers, and secondly that they created a joint tenancy with rights of survivorship as distinct from a tenancy in common. This latter contention in their Lordships' opinion is inconsistent with the decision of this Board in *Jogeswar Narain Deo* v. *Ram Chund Dutt*[1] upon which strangely enough reliance was placed by the defendants in both Lower Courts. In that case a Hindu testator left a four annas share of his estate to his daughter and her son for their maintenance with powers of alienation by gift or sale, and the question was whether a perpetual lease of her own

1. (1896) L. R. 23 I. A. 37: I. L. R. 23 Cal. 670: 6 M. L. J. 75 (P. C.).

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share granted by the daughter was binding beyond her life-time. Before the Board it was contended for the first time that, even if she took absolutely, she took jointly with her son as joint tenants and not as tenants-in-common, and that she could not before severance of the estate make an alienation without the consent of her coparcener, as held by the Madras Court in *Vydinada* v. *Nagammal*[1]. With reference to this decision Lord Watson observed :

> "There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu Law, except in the case of coparcenary between the members of an undivided family. In the second place, the learned Judges misapprehended the law of England, because it is clear, according to that law, that a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants, operates as severance."

In their Lordships' opinion this is a clear ruling that the principle of joint tenancy is unknown to Hindu Law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law which under that law passes by survivorship.

There could therefore be no question of these grants creating a joint tenancy as opposed to a tenancy in common, even if according to English law the terms of these instruments admitted of such a construction.

As to the question whether these grants were made to these two brothers severally or as members of a joint family, that depends on the intention of the donor as expressed in the grants. *Prima facie* a gift to a member of a joint Hindu family is his separate property and will only become joint family property when it descends to his sons, unless he himself has made it joint family property by throwing it into the common stock. There is nothing in the terms of these maintenance grants to these two brothers to suggest that the Government intended to make a grant to a joint family. As regards the first grant, property granted to one of the two brothers and his heirs would clearly be taken by him as his separate property and the fact that this grant was made to the two brothers and their heirs is not a sufficient reason for placing a different construction upon

1. (1888) I. L. R. 11 Mad. 258.

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the grant or holding that it was intended that they should take as members of a joint family.

The second grant to the two brothers "their heirs, executors, administrators and assigns in full transferable and proprietary right" and the third grant to them "and their heirs, successors and assigns" are expressed in terms even less favourable to the defendants' case.

Their Lordships therefore agree with the Chief Court that these grants conferred an estate of inheritance on each of the two brothers in the subject-matter of the grant.

In their Lordships' opinion the appeal fails and should be dismissed and they will humbly advise His Majesty accordingly. The appellants will pay the respondent's costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondent: *Watkins and Hunter.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD TOMLIN, LORD THANKERTON AND SIR GEORGE LOWNDES.

Gummidelli Anantapadmanabhaswami .. *Appellant**

v.

The Official Receiver of Secunderabad and others .. *Respondents.*

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Civil Procedure Code (V of 1908), Ss. 2 (5) and 64—District Court of Secunderabad, a "foreign" Court—Order of adjudication in bankruptcy made by foreign Court—Effect on a prior attachment of a decree in British India.

In execution of a money decree obtained by the appellant against his judgment-debtors, he attached in December, 1926, in the Madras High Court, a preliminary decree for partition which had been passed by the High Court in favour of the judgment-debtors. In September, 1928, an order was made by the District Court at Secunderabad adjudicating as insolvents the said judgment-debtors.

Held, on the question as to what effect was to be given by the Madras Courts to the adjudication order of the Secunderabad Court in competition with the prior attachment of the decree in the Madras Court,

1. That the British Cantonment in Secunderabad being part of the Hyderabad State and the property of the Nizam, the District Court at Secunderabad was a "foreign" Court in relation to the Courts of British India: *Hossain Ali Mirza* v. *Abid Ali Mirza*, (1893) I.L.R. 21 Cal. 177, relied on.

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2. That, on the authority of *Galbraith* v. *Grimshaw*, (1910) A. C. 508, the appellant's prior attachment was not avoided by the subsequent adjudication order of the foreign Court (Secunderabad Court).

Quaere, as to the effect a British Indian adjudication order would have had on the appellant's prior attachment, and whether under the Civil Procedure Code an attachment creates a lien or charge or confers title: *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*, (1903) I.L.R. 26 Mad. 673 and *Frederick Peacock* v. *Madan Gopal*, (1902) I. L. R. 29 Cal. 428 (F. B.), referred to.

Judgment of the High Court, Madras, (I. L. R. 54 Mad. 727 : 61 M L.J. 774), reversed.

Appeal No. 86 of 1931 from a judgment and decree, dated the 2nd October, 1930, of the High Court of Madras, reversing a judgment and an order of the same High Court in its Ordinary Original Civil Jurisdiction, dated the 23rd April, 1929.

The main question for consideration on this appeal was, whether a vesting order made by the District Court of Secunderabad prevailed against a prior attachment of a decree effected by a Court in British India. The facts of the case will be found set out in their Lordships' judgment and in the judgment of the High Court reported in *Official Receiver of Secunderabad* v. *Lakshminarayana*[1].

Upjohn, K.C. (with *Hyam*) for appellant.

Narasimham for respondents.

2nd February, 1933. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 2nd October, 1930, which set aside a judgment and order, dated the 23rd April, 1929, made by the same Court in its Original Civil Jurisdiction.

The appellant is in right of a money decree for Rs. 53,230-9-0, dated the 15th June, 1926, made in the Bombay High Court in favour of the appellant's father against three persons, who may be conveniently referred to as the judgment-debtors. At that time the judgment-debtors were the plaintiffs in a suit then pending in the Madras High Court for partition of certain joint family property between the plaintiffs' and the defendants' branches of the family. The Madras partition suit had been instituted in 1922, and on the 5th December, 1922, a preliminary decree by consent had been made, declaring *inter alia* certain properties and business assets involved in the suit to be the exclusive properties of the plaintiffs' branch and

1. (1931) I. L. R. 54 Mad. 727 : 61 M. L. J. 774.

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directing certain interim payments of money to be made by the defendants to the plaintiffs. The decree further directed certain arbitrators to take the joint family account and to partition the joint family property between the two branches of the family in two equal shares. The arbitrators failed to come to any final decision and the matter was referred to the Official Referee of the Court by consent.

On the 20th December, 1926, the preliminary decree in the Madras suit was attached in the Madras High Court by the present appellant's father, in execution of the decree in the Bombay suit, the execution proceedings having been transferred from the Bombay High Court to the Madras High Court.

In September, 1928, the defendants in the Madras suit applied for a final decree in terms of a compromise entered into between them and the plaintiffs on the 5th August, 1928, and, on the 21st September, 1928, the High Court of Madras passed an order for a final decree in the partition suit in terms of the compromise but upon certain conditions, one of which was that the defendants should first pay into Court the amount of money due to the present appellant under the Bombay decree in respect of which the attachment had been made. That order has not been carried out and, in fact, is now under appeal in the Madras High Court.

On the 15th September, 1928, an order was made by the District Court at Secunderabad, on a creditors' petition, adjudging as insolvents two of the plaintiffs in the Madras partition suit, who are also the judgment-debtors (the third plaintiff having died leaving his widow as his legal representative). The Official Receiver of Secunderabad, who is trustee in the bankruptcy, is a respondent in the present appeal.

On the 4th March, 1929, the appellant's father took out a Judge's summons in the High Court of Madras and started the present proceedings against the parties to the Madras partition suit, for leave to execute the decree attached by him. The proceedings were opposed by the defendants in the partition suit and by the Official Receiver of Secunderabad, who was then made a party plaintiff to the partition suit in substitution of the insolvents, the two surviving plaintiffs in that suit, and who is the active respondent in the present appeal.

It is first necessary to consider whether, in the Madras Court, the adjudication order is to be regarded as the order of

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a foreign Court. Both the Courts below have held that it is to be so regarded and their Lordships agree with that conclusion. It is not suggested that the position of Secunderabad has altered from that stated by the Foreign Office to the Court, and referred to in the judgment, in *Hossain Ali Mirsa* v. *Abid Ali Mirsa*[1]. That reply makes clear that the British Cantonment in Secunderabad still remains part of Hyderabad State and the property of the Nizam. The administration of justice according to British enactments by the District Court established there does not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India.

There remains the question of what effect is to be given by the Madras Courts to the adjudication order of a foreign Court in competition with the prior attachment of a decree in the Madras Court.

The learned Trial Judge held, under the principles laid down in *Galbraith* v. *Grimshaw*[2], that the present respondent could only take subject to the present appellant's rights of attachment, and made an order continuing the attachment until the further orders of the Court, and giving the appellant leave to execute the preliminary decree in the partition suit. The Appellate Court set aside that order and dismissed the present appellant's application, in substance on the ground that an attachment under the Civil Procedure Code is purely prohibitory and does not operate to create any title, lien or security in favour of the attaching creditor which, according to British Indian law, could prevail over the Receiver in insolvency, and that it made no difference that the adjudication order was made by a foreign Court.

Their Lordships do not agree with the reasoning or conclusion of the Appellate Court. The question is one of comity between States and not one of the municipal bankruptcy codes of either country. The rule of private international law is clearly laid down in *Galbraith* v. *Grimshaw*[2] as regards movable estate, for it is settled that no adjudication order is

1. (1893) I. L. R. 21 Cal. 177 at 179.
2. (1910) A. C. 508.

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recognised as having the effect of vesting in the Receiver any immovables in another country.

The reason for the rule is stated in the speech of Lord Dunedin in *Galbraith's* case[1] (at p. 513):

"Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze* v. *Aders*[2] is only one example."

This means that, after the date of the foreign adjudication order, it will be recognised as effective, but it is equally clear from the opinions expressed in *Galbraith's* case[1] that it will not be allowed to interfere with any process at the instance of a creditor already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject-matter of the process to the Receiver. As Lord Macnaghten says (at p. 512):

"The Scottish Court (the foreign Court) can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt attached by the order *nisi* was at the date of the sequestration earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so."

In an earlier passage Lord Macnaghten had said,

"A creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence."

In the present case, at the date when the foreign adjudication order was made, the appellant was entitled to the benefit of his prior attachment of the decree in the Madras partition suit. The decree was thereby earmarked for the purpose of answering the Bombay money decree, and that inchoate right would have riped into execution and sale; it is no matter that under section 73 of the Civil Procedure Code the appellant would

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1. (1910) A. C. 508. 2. (1874) 2 R. 150.

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have to share the proceeds of sale with other decree-holders; it would still be a valuable right. The Scottish case of *Hunter & Co.* v. *Palmer*[1] in which an arrestment in Scotland was preferred to a posterior English commission of bankruptcy, is very similar to the present case. Arrestment is only inchoate diligence; to complete the transfer and make the arrester's right real a decree of furthcoming must be subsequently obtained, which adjudges the fund arrested to the arrester. No decree of furthcoming had been obtained in *Hunter's* case.

It is irrelevant to consider what effect a British Indian adjudication order would have had on the appellant's prior attachment. The question is what the pending process of attachment would have ripened into, if uninterrupted. Equally, it is irrelevant to point out that a British Indian adjudication order would not be affected by the prohibitory provisions of section 64 of the Code, as it is not a private transfer; such an order operates *vi statuti*, but the foreign adjudication order does not operate in British India *vi statuti*, but only under the rule of private international law. In *Galbraith's* case[2] Lord Loreburn states the test as follows:—

"In each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he could not have it unless the bankrupt could himself have assigned it."

It is clear in the present case that, by reason of section 64, the bankrupts could not have assigned their right in the decree which had been attached. This test renders it irrelevant to consider whether the attachment created a lien or charge or conferred title, and the cases relating to British Indian bankruptcies relied on by the learned Judges of the Appellate Court have no bearing on the present question. In *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*[3] the Court appears to have ignored the opinion expressed by this Board in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*,[4] which was cited to them, and to have taken a dictum in the judgment of this Board in *Moti Lal* v. *Karrab-ul-Din*[5] from its context and used it for a purpose which it did not have in view. In *Frederick Peacock* v. *Madan*

1. (1825) 3 Shaw 402.
2. (1910) A. C. 508.
3. (1903) I. L. R. 26 Mad. 673.
4. (1879) L. R. 6 I. A. 88: I. L. R. 5 C. 148 (P. C.).
5. (1897) L. R. 24 I. A. 170 at 175: I. L. R. 25 C. 179 (P. C.).

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Gopal[1] the case of *Suraj*[2] *Bunsi*, was not referred to, and the dictum from *Moti Lal's* case[3] was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das* v. *Sundar Das Khetri*[4] was also referred to, but that decision proceeded on an admission by counsel, the point was not argued and the case of *Suraj Bunsi*[2] was not referred to.

Accordingly, their Lordships are of opinion that the decision of the Trial Judge was right, and they will humbly advise His Majesty that the appeal should be allowed, that the decree of the Appellate Court, dated the 2nd October, 1930, should be reversed and that the order of the Trial Judge, dated the 23rd April, 1929, should be restored. The appellant will have the costs of this appeal and his costs in the appeal before the Appellate Court.

Solicitors for appellant: *Barrow Rogers & Nevill.*

Solicitor for respondents: *Harold Shephard.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Arumuga Mudaliar .. *Petitioner* (1st Respondent and 2nd Defendant)*

v.

Venkatachala Pillai and others .. *Respondents (Appellants—2nd Respondent-Plaintiffs 2 and 3 and 2nd Plaintiff).*

Arumuga Mudaliar *v.* Venkatachala Pillai.

Court Fees Act (VII of 1870)—Sch. II, Art. 17 and S. 7 (v)—Suit to avoid claim order—Court-fee payable—Value of suit for purposes of jurisdiction—Mode of determining value of land—Suits Valuation Act (VII of 1887), Ss. 3 and 4—Effect of S. 14, Madras Civil Courts Act.

The plaintiff had purchased an item of land from the 2nd defendant and his mother for a certain price. The 1st defendant who obtained a decree against the 2nd defendant attached the property and thereupon the plaintiff preferred a claim in execution but the same was dismissed. The plaintiff having sued to cancel the order on the claim petition, to declare the plaintiff's title to the property, to raise the attachment and to obtain a permanent injunction against the execution being continued to sale,

Held, that the suit was in substance one to avoid the attachment and Court-fee was payable under Art. 17 of Sch. II of the Court Fees Act.

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*C. R. P. No. 1904 of 1931. 18th October, 1932.

1. (1902) I.L.R. 29 Cal. 428.
2. (1879) L. R. 6 I. A. 88: I. L. R. 5 C. 148 (P. C.).
3. (1897) L. R. 24 I. A. 170: I. L. R. 25 C. 179 (P. C.).
4. (1914) L. R. 41 I. A. 251: I. L. R. 42 C. 72: 27 M. L. J. 150 (P. C.).

Phul Kumari v. *Ghanshyam Misra*, (1907) L. R. 35 I. A. 22: I. L. R. 35 Cal. 202: 17 M. L. J. 618 (P. C.), relied on.

Held further, that assuming that in such a suit the subject-matter was the land concerned in the claim order, the proper value of the suit for purposes of jurisdiction was the value of the land as determined under S. 7 (*v*) of the Court Fees Act and not its market value.

Effect of S. 14 of the Madras Civil Courts Act and Ss. 3 and 4 of the Suits Valuation Act discussed.

Krishnasami Naidu v. *Somasundaram Chettiar*, (1907) I. L. R. 30 Mad. 335: 17 M. L. J. 95 (F. B.) and *Narayanan Nair* v. *Cheria Kathiri Kutty*, (1918) I. L. R. 41 Mad. 721: 34 M. L. J. 397, referred to.

Chalasamy Ramiah v. *Chalasamy Ramaswami*, (1912) 13 I. C. 903 and *Vasireddi Veeramma* v. *Butchayya*, (1926) I. L. R. 50 Mad. 646: 52 M. L. J 381, considered.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the Subordinate Judge of Cuddalore in C. M. A. No. 2 of 1931 (C. M. A. No. 3 of 1931 on the file of the District Court of South Arcot at Cuddalore) preferred against the order of the Court of the District Munsif of Cuddalore, dated the 9th day of October, 1930 and made in O. S. No. 962 of 1928.

K. Balasubrahmania Aiyar for petitioner.

N. K. Mohanarangam Pillai for respondents.

The Court delivered the following

Krishnan Pandalai, J.

JUDGMENT.—This petition affords a good example of the regrettable delays to which litigation has now become subject owing to questions of Court-fee and jurisdiction having become a common feature in the Subordinate Courts which take years for their determination. In this case the suit was of a common enough kind and was brought in 1928. At the end of 1932 it remains still to be decided which is the proper Court to try it. The plaintiff had bought some property from the 2nd defendant and his mother for Rs. 3,700. The 1st defendant obtained a decree for Rs. 1,170 in 1927 against the 2nd defendant alone and attached that property. The laintiff preferred a claim in execution which was dismissed. Within the year allowed for a suit he brought this suit impleading the decree-holder, the 1st defendant and the judgment-debtor, the 2nd defendant. In the plaint he set out these facts as affording the cause of action and prayed (here the trouble begins) (1) to cancel the order, dated 6th October, 1928, on the claim petition, (2) to declare the plaintiff's title to the property under his sale deeds, (3) to raise the attachment, and (4) for a permanent injunction against the execution being continued to sale. It will be observed that although the plaintiff made four

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prayers, the substance of the whole matter was that his property had been illegally attached and he wanted that to be avoided; all else was mere words. The first and third prayers mean the same thing that the plaintiff wanted the claim order avoided. The fourth prayer is the consequence of that and the second is incidental to it. In this suit the plaintiff paid a Court-fee of Rs. 10 under Sch. II, Art. 17 of the Court Fees Act. That this was right there is now no question. The matter is set at rest by the decision of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*,[1] a very similar case in which their Lordships point out that in spite of unnecessary prayers the substance of the suit should be looked at to determine what the Court-fee payable is.

But the question was raised as to the proper Court for purposes of jurisdiction which was to try this suit. One would have thought at this distance of time that there can be no arguable question on such a matter. But not only has it been argued but while the District Munsif held following *Narayanan Singh* v. *Aiyasami Reddi*,[2] that he had no jurisdiction to entertain the suit because the value for purposes of jurisdiction is according to him the market value of the property which is more than Rs. 3,000 as the plaintiff admittedly bought it for Rs. 3,700, the learned Subordinate Judge in appeal held following *Krishnasami Naidu* v. *Somasundaram Chettiar*[3] that the value for jurisdiction is the amount of the debt Rs 1,170; that even if it be considered to be the value of the property it was not more than one-half of Rs. 3,700, the market value, *viz.*, Rs. 1,850 as a result of the Madras amendment to S. 7 (*iv*) (*c*) of the Court Fees Act; but that in his view the value of the land should be computed for purposes of jurisdiction according to S. 7 (*v*) of the Court Fees Act, *i. e.*, at 10 times the assessment in which case the whole value would be less than Rs. 3,000.

In this Court the learned Counsel for the petitioner has addressed a very able argument that the view of the Munsif is right. He certainly has one or two decisions which would seem to support by parity of reasoning his argument that in a suit like this which must be deemed a declaratory suit respecting land the proper value for purposes of jurisdiction is the full market value of that land and not either the value as determined

1. (1907) L. R. 35 I. A. 22: I. L. R. 35 Cal. 202: 17 M. L. J. 618 (P. C.).
2. (1915) I. L. R. 39 Mad. 602: 29 M. L. J. 728.
3. (1907) I. L. R. 30 Mad. 335: 17 M. L. J. 95 (F. B.).

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under S. 7 (*v*) of the Court Fees Act or half the market value according to the Madras amendment to S. 7 (*iv*) (*c*). The decisions he relies upon are ***Vasireddi Veeramma* v. *Butchayya*[1]** and ***Chalasamy Ramiah* v. *Chalasamy Ramaswami*[2]** which it relies on and follows. On the other hand the respondents' learned advocate argues that the Subordinate Judge's view is right and that the value for purposes of jurisdiction in the present suit is the amount of the debt Rs. 1,170 and even if the subject-matter is taken to be the land its value should be computed as prescribed by S. 14 of the Madras Civil Courts Act which adopts the valuation in S. 7 (*v*) of the Court Fees Act for purposes of jurisdiction in all cases where the subject-matter of the suit is land, houses or gardens.

Now if this suit were really of the same nature as that in ***Vasireddi Veeramma* v. *Butchayya*[1]** or ***Chalasamy Ramiah* v. *Chalasamy Ramaswami*[2]** I should be bound by them, because they are Bench decisions. But ***Vasireddi Veeramma* v. *Butchayya*[1]** was a suit to establish the validity of an adoption and not one in which the subject-matter was land. The Court held that the properties which might accrue to the adopted person were not the subject-matter of the suit, but only the adoption itself. The grounds of the decision are entitled to very great weight but the decision itself was on the point just stated, *viz.*, that in a suit to establish an adoption S. 14 of the Madras Civil Courts Act, which relates only to cases where land is the subject-matter, is not applicable. Similarly in ***Chalasamy Ramiah* v. *Chalasamy Ramaswami*[2]** the suit was one for partition of lands of which the plaintiff was in joint possession and what was held was that in such a suit the plaintiff was entitled to place his own valuation for the purposes of jurisdiction. Although there were observations as to the effect of S. 14 of the Civil Courts Act in that case also, they were for purposes of that decision that the plaintiff was entitled to value the relief for purposes of jurisdiction as he liked.

It appears to me that in the suit before me even if it is governed by ***Narayanan Singh* v. *Aiyasami Reddi*[3]** and not by ***Krishnasami Naidu* v. *Somasundaram Chettiar*[4]** all that it leads to is that the subject-matter is the land and not the debt. The

1. (1926) I. L. R. 50 Mad. 646: 52 M. L. J 381. 2. (1912) 13 I. C. 903.
3. (1915) I. L. R. 39 Mad. 602: 29 M. L J. 728.
4. (1907) I. L. R. 30 Mad. 335: 17 M. L J. 95 (F. B.).

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plaintiff's land was attached, his claim thereto was dismissed, and he wants that summary decision set aside. Assuming that in such a suit the subject-matter is the land concerned in the claim order, S. 14 of the Madras Civil Courts Act is explicit when it declares that "when the subject-matter of any suit or proceeding is land, a house or garden, its value shall, for purposes of jurisdiction conferred by that Act, be assessed in the manner provided by the Court Fees Act of 1870, S. 7 (*v*)". In my opinion those words are imperative and clear. But it is said that that section is applicable only in classes of suits referred to in S. 3 of the Suits Valuation Act, *viz.*, suits governed by S. 7, paras. (*v*), (*vi*) and (*x*) (*d*) of the Court Fees Act; that is, possession of land, pre-emption and specific performance of an award. This method of interpreting this section is adopted by inference from the effect of S. 6 of that Act. It says that when rules under S. 3 are made for the territories under the administration of the Madras Government, S. 14 shall stand repealed as regards this presidency. A fallacy lurks in this inference because the effect of S. 4 of the Suits Valuation Act which is material in this connection is left out. That section says that when rules for valuing land have been made under S. 3 the same value shall be applicable as a maximum in suits relating to land or an interest in land falling within S. 7 (*iv*) or Sch. II, Art. 17. Now the suits relating to land in S. 7 (*iv*) are in sub-clauses (*b*), (*c*), (*d*) or (*e*). Clause (*b*) deals with suits for partition, (*c*) with declaratory suits where consequential relief is prayed, (*d*) for injunction, and (*e*) for a right to some benefit not otherwise provided for to arise out of land. In these suits and suits falling like the present one under Sch. II, Art. 17 relating to land the valuation according to the rules made under S. 3 are to be adopted but as a maximum. This is to prevent over-valuation of such suits. In suits for partition, declaration or injunction in respect of land or for some benefit to arise out of land not otherwise provided for it would be necessary to value the land and it would be also necessary to value the interest involved and in such cases the section provides that the valuation of land under rules made under S. 3 shall be adopted as a maximum. The effect of this section on S. 6 is that if rules are made under S. 3 the valuation thereby prescribed will be applicable also to the suits mentioned in S. 4 and then the need for S. 14 of the Civil Courts Act ceasing to exist that section

shall stand repealed. Therefore it seems to me incorrect to say that S. 14 of the Civil Courts Act refers only to suits mentioned in S. 3 of the Suits Valuation Act.

The present is a suit falling within Schedule II, Art. 17 of the Court Fees Act which is expressly mentioned in S. 4 of the Suits Valuation Act as a class to which the valuation under S. 3 will apply. Therefore if the subject-matter of the suit is land not only is there nothing in the Suits Valuation Act which prevents the application of S. 14 of the Civil Courts Act to this suit but that section requires that the proper method of valuing land for purposes of jurisdiction is under S. 7 (*v*) of the Court Fees Act. This view of section 14 is fortified by a decision in *Narayanan Nair* v. *Cheria Kathiri Kutty*[1] where it was held that the valuation therein prescribed is applicable to suits for pre-emption which are governed by S. 7 (*vi*).

Reliance was placed for the petitioner on the decision in *Narayanan Singh* v. *Aiyasami Reddi*[2] and by the other side on the Full Bench decision in *Krishnasami Naidu* v. *Somasundaram Chettiar*[3]. It seems to me that the principle of the Full Bench decision has been upheld by the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*,[4] that it is the substance and object of the suit which should be regarded and not the words and also that where the debt is less than the value of the property it is the former that determines the value of the suit to the plaintiff. But in *Narayanan Singh* v. *Aiyasami Reddi*[2] emphasis was laid on the words of the various prayers, which, it was thought, took the case out of the category of cases dealt with by the Full Bench. In the Full Bench case which was decided at a time when the Munsif's jurisdiction was only Rs. 2,000, it was held that a suit to avoid a claim was not a suit to obtain declaration of title to the property but one for getting rid of the effect of the order disallowing the claim and ought to be valued for purposes of jurisdiction at the amount for which the property was attached when such amount is less than the value of the property which was more than Rs. 2,000. In *Narayanan Singh* v. *Aiyasami Reddi*[2] a distinction was made that where the judgment-debtor is a party to the claim order and there is a distinct prayer for declaration of title to the property

1. (1918) I. L. R. 41 Mad. 721: 34 M. L. J. 397.
2. (1915) I. L. R. 39 Mad. 602: 29 M. L. J. 728.
3. (1907) I. L. R. 30 Mad. 335: 17 M. L. J. 95 (F.B.).
4. (1907) L. R. 35 I. A. 22: I. L. R. 35 Cal. 202: 17 M. L. J. 618 (P.C.).

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it is the value of that property which determines the jurisdiction. This distinction has no bearing to the present case because assuming that it is the value of the property which does determine the jurisdiction the Munsif would still have jurisdiction. (The remark in *Narayanan Singh* v. *Aiyasami Reddi*[1] that the Full Bench decision does not refer to the Privy Council decision in *Phul Kumari* v. *Ghanshyam Misra*[2] must be due to an oversight as the former was the earlier.) The only point in dispute is how the property is to be valued whether on the market value or under S. 7 (*v*) of the Court Fees Act. I have given grounds for thinking that the latter is the correct view. The learned Judge's order was therefore right in either view and this petition must be dismissed with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

The District Board of Ramnad through its President .. *Appellant** (*Plaintiff*)

v.

D. K. Mahomed Ibrahim Sahib and another .. *Respondents* (*Defendant and nil*).

The District Board of Ramnad v. Mahomed Ibrahim Sahib.

Limitation Act (IX of 1908), Arts. 62 and 120—Subscription collected for construction of bridge—Suit by District Board for recovery from person making collection—Limitation—Starting point—Scope of Art. 62.

The defendant promised to pay to the plaintiff, a District Board, a certain amount by way of personal contribution for the purpose of constructing a bridge over a river and he also collected subscriptions for the same purpose. The District Board sued through its President to recover from the defendant both the amounts. The evidence in the case showed that the construction of the bridge could not have been begun earlier than 1923 and the suit was instituted on 5th September, 1925. The Lower Court decreed the suit in respect of the personal contribution but held that the claim as regards the subscription collected was barred by limitation.

Held, in appeal, that the claim in respect of the subscription amount was not barred by limitation, Art. 120 and not Art. 62 of the Limitation Act being applicable. The subscription became payable only when definite steps had been taken towards the construction of the bridge.

Kedarnath Bhattacharji v. *Gorie Mahomed*, (1886) I.L.R. 14 Cal. 64 and *Maharaja Mudaliar* v. *Sendanatha Mudaliar*, 1918 M. W. N. 173, relied on.

Art. 62 of the Limitation Act contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received.

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* Appeal No. 24 of 1927. 4th January, 1933.

1. (1915) I. L. R. 39 Mad. 602: 29 M. L. J. 728.

2. (1907) L. R. 35 I. A. 22: I.L.R. 35 Cal. 202: 17 M.L.J. 618 (P.C.).

It does not apply where the plaintiff is not entitled to the money when it was received by the defendant.

Ma Kyin Ain v. *A. R. M. A. L. A. Chettiar Firm*, A. I. R. 1930 Rang. 197, referred to.

The District Board of Ramnad *v.* Mahomed Ibrahim Sahib.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 50 of 1925.

P. Venkataramana Rao for appellant.

M. Subbaroya Aiyar for respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

Madhavan Nair, J.—The plaintiff, the District Board of Ramnad through its President, is the appellant. The question in this appeal is whether the appellant's claim to recover from the defendant Rs. 1,031 subscription collected by him for the purpose of constructing a bridge over the Paralyar river is barred by limitation. A sum of Rs. 5,000 was promised by the defendant as personal contribution for the purpose of constructing the bridge and a sum of Rs. 1,031 was collected by him for the same purpose. The river was bridged at a cost of Rs. 29,000 odd and was completed on 12th July, 1924. In the suit out of which this appeal arises the President of the District Board claims both the sums from the defendant. The Lower Court gave a decree for Rs. 5,000 but held that the claim for Rs. 1,031 was barred by limitation applying Art. 62 of the Limitation Act.

Article 62 prescribes three years for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use and the period begins to run from the date when the money is received. It is clear to us that Art. 62 will not apply to cases of this kind, for it has been held that that Article contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received. See *Ma Kyin Ain* v. *A. R. M. A. L. A. Chettiar Firm*[1]. Art. 62 cannot be appropriately applied to a case where the plaintiff is not entitled to the money when it was received by the defendant. In this case it is clear that the amount does not become payable to the plaintiff as soon as it is collected. The plaintiff can claim the amount only after the work has been begun and some steps have been taken towards the construction of the bridge. It follows from the decision of the Calcutta High Court in *Kedarnath Bhattacharji* v. *Gorie Mahomed*[2] that a promise to pay a subscription becomes enforceable as soon as

1. A. I. R. 1930 Rang. 197. 2. (1886) I. L. R. 14 Cal. 64.

The District Board of Ramnad *v.* Mahomed Ibrahim Sahib.

Madhavan Nair, J.

any definite steps have been taken in furtherance of the object and on the faith of the promised subscription. This decision has been followed by this Court in *Maharaja Mudaliar* v. *Sendanatha Mudaliar*[1]. The evidence in this case shows that the construction work of the bridge could not have been begun earlier than 1923. The suit was instituted on the 5th September, 1925. If Art. 62 does not apply, then the only Article applicable is 120. The suit is therefore clearly within time and it cannot be held to be barred by limitation.

The decree of the Lower Court in so far as it relates to Rs. 1,031 is set aside and the plaintiff will be given a decree for this amount also, with costs here and in the Court below.

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

T. R. Manikkam Pillai and another .. *Petitioners** (*Plaintiffs*)

v.

T. S. Murugesam Pillai and others .. *Respondents* (*Defendants*).

Manikkam Pillai *v.* Murugesam Pillai.

Court Fees Act (VII of 1870 as amended in Madras), Sch. II, Art. 17-B and S. 7 (iv) (f)—Hindu joint family—Prior division in status—Suit for partition by metes and bounds—Separate prayer for rendition of accounts—Court-fee payable.

Where the plaint alleged that though there was a prior division in status the plaintiffs and the defendants continued in joint possession of the family properties and the suit was for division and separate possession of the plaintiffs' share in the immovable properties and for rendition of accounts,

Held, that the claim for partition fell under Art. 17-B of Sch. II of the Court Fees Act as amended in Madras.

The Secretary of State for India in Council v. *Lakhanna*, (1932) 64 M. L. J. 24, followed.

Held further that the prayer for accounts was leviable to separate Court-fee under S. 7 (*iv*) (*f*) of the Act.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the finding order of the Court of the Subordinate Judge of Kumbakonam, dated 4th November, 1931 and made in O. S. No. 6 of 1929.

T. M. Krishnaswami Aiyar and *A. Nagaswami Aiyar* for petitioners.

B. Sitarama Rao for respondents.

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* C. R. P. No. 14 of 1932. 24th February, 1933.

1. 1918 M. W. N. 173.

Manikkam Pillai v. Murugesam Pillai.

The Court delivered the following

JUDGMENT.—The question of Court-fee payable has to depend on the allegations in the plaint, and this is not the stage at which the Court should say whether these allegations are true or not. In the plaint there is no prayer for a declaration that the partition deed referred to therein should be set aside, nor is any declaration asked for in respect of it. The trend of the plaint seems to be, that though severance in status is effected, there was no actual division by metes and bounds, but, on the other hand, the plaintiffs and defendants are in joint possession (*vide* para. 22 of the plaint). So far as the partition of the immovables is concerned in view of the prior division in status, the suit is for division and separate possession of the plaintiffs' share as against other tenants-in-common. The claim will fall under Art. 17-B, Sch. II of the Court Fees Act. Vide *The Secretary of State for India in Council* v. *Lakhanna*[1]. The fixed fee of Rs. 100 has been paid.

There is an additional prayer for rendition of accounts. This portion of the claim will bring the case under cl. (*f*) of sub-S. (*iv*) of S. 7 of the Court Fees Act.

The plaintiffs should value this relief as a suit for accounts, and pay additional Court-fee within a time to be fixed by the Lower Court. The order sought to be revised is modified accordingly. The parties will bear their own costs.

B. V. V. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE BARDSWELL.

Sri Chidambara Sivaprakasa Pandara Sannadhi Avergal .. *Appellant* (Appellant in S. A. No. 64 of 1926 on the file of the High Court—Plaintiff)*

v.

Manickam Pillai and another .. *Respondents (Respondents 2 and 3 in do.—Defendants 3 and 4).*

Sri Chidambara Sivaprakasa Pandara Sannadhi v. Manickam Pillai.

Hindu Law—Religious endowments—Head of Mutt—Grant of permanent lease of endowed property—Binding nature on grantor.

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*Letters Patent Appeal No. 115 of 1929. 11th January, 1933.

1. (1932) 64 M. L. J. 24.

Sri Chidambara Sivaprakasa Pandara Sannadhi *v.* Manickam Pillai.

Where the head of a Mutt grants a permanent lease of immovable property with which the Mutt is generally endowed, the lease is good at least for the lifetime of the grantor and he cannot sue to avoid it.

Vidya Varuthi v. *Balusami Ayyar*, (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.), relied on.

Andalam Hanumanthu v. *Peruri Kristabrahmam*, (1927) 26 L. W. 202, disapproved.

Decision of *Sundaram Chetty, J.*, affirmed.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Sundaram Chetty, dated the 3rd day of September, 1929, and passed in Second Appeal No. 64 of 1926 preferred to the High Court against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 51 of 1924 (A. S. No. 378 of 1920, District Court, Tanjore —O. S. No. 224 of 1918 on the file of the Court of the Principal District Munsif of Tiruvalur).

The judgment of Sundaram Chetty, J., under appeal, was as follows:—

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This Second Appeal arises out of a suit filed by the plaintiff-appellant for the recovery of possession of the plaint-mentioned *manai* together with arrears of rent, from the defendants, to whose ancestor this site was granted by the plaintiff under the registered lease deed, Ex. A. It is dated 3rd July, 1891. The plaintiff's case is, that he is the head of Sivaprakasa Swamigal Mutt, that the suit property which is situated in Madappuram village belongs to the aforesaid Mutt and that it was leased out to the father of defendants 1 to 3 who took it for erecting a house thereon for his occupation. Plaintiff's claim was resisted by the defendants on several grounds. It was urged that the lease granted by the plaintiff was a permanent lease, that no default was made in the payment of rent, that the plaintiff's suit was barred by limitation and that in case of eviction a sum of Rs. 1,000 should be paid as compensation for the house built on the suit site. Both the Lower Courts have found that the lease granted under Ex. A was a permanent lease. The Lower Appellate Court has found that this permanent lease was not granted for any benefit or necessity of the Mutt, but on a consideration of the case-law on the point, held that the lease in question is good till the end of the plaintiff's lifetime, whatever may be the binding character of it so far as the plaintiff's successor is concerned. In this view the learned Subordinate Judge dismissed the plaintiff's suit, confirming the decision of the first Court.

In this Second Appeal the main contention urged before me is that the Lower Appellate Court is wrong in holding that the permanent lease under Ex. A granted by the plaintiff is valid for his

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lifetime. In order to decide this question, a brief review is necessary of the decisions which have dealt with the true status and position of a Matadhipathi or the head of a Mutt and his power of alienation over the properties belonging to the Mutt. This question has been no doubt the subject of several decisions; but the real difficulty consists in understanding the true import thereof on account of some passages in the several judgments containing observations which may at first sight seem to be difficult of reconciliation. In the case reported in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Thirtha Swami*[1] there is a very learned and exhaustive discussion of this question, and the opinion expressed by both the learned Judges is that the head of a Mutt is not a mere trustee as the Dharmakartha of a temple, but he has an estate for life in the permanent endowments of the Mutt and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution. The Matadhipathi is considered to have a beneficial interest in the usufruct and the surplus income belongs to him which he could dispose of at his will. In the judgment of the Privy Council in *Srinivasa Chariar* v. *Evalappa Mudaliar*[2] which was delivered by Lord Shaw, the distinction which was recognised in the case in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Thirtha Swami*[1] between the head of a Mutt and the dharmakartha or trustee of a temple is referred to with approval, and the particular passage at page 581 is as follows:—

> "The position of dharmakartha is not that of a shebait of a religious institution, or of the head of a Mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character."

The question came up for decision again in this Court and was referred to a Full Bench (vide *Kailasam Pillai* v. *Nataraja Thambiran*[3]). According to the opinion of the Full Bench, it could not be predicated of the head of a Mutt, as such, that he holds the Mutt properties as a life-tenant or trustee, but the question must be determined in each case upon the conditions on which they were given or which may be inferred from the usage and custom of the institution. That even the head of a Mutt would be a trustee with respect to any particular property shown to have been granted on specific trust, whereas with respect to the general assets of the Mutt he would be a sort of beneficial owner and not a mere trustee, is to be carefully kept in view in order to avoid confusion. This distinction has been recognised by Wallis, J. (as he then was) as

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1. (1904) I. L. R. 27 Mad. 435: 14 M. L. J. 105.
2. (1922) L. R. 49 I. A. 237: I. L. R. 45 Mad. 565: 43 M. L. J. 536 (P. C.).
3. (1909) I. L. R. 33 Mad. 265: 19 M. L. J. 778 (F. B.).

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would appear from the following observation on page 280 of the aforesaid Full Bench decision:

"My answer is that heads of Mutts cannot be regarded as trustees of Mutt endowments except in so far as it may be shown that any particular endowment was granted to them on trust. It is unnecessary to discuss any other questions, but I desire to say generally that as at present advised I see no reason for differing from the conclusions arrived at in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Thirtha Swami*[1] as to the position of the head of a Mutt with regard to Mutt properties as to which no specific trust is established in the manner already mentioned."

In *Muthusamier* v. *Sreemethanithi Swamiyar*[2] the position of the head of a Mutt has been held to be not that of a tenant for life, but he is in a certain sense owner in fee simple, though in many respects he has only the powers of a tenant for life. It was also stated that an alienation by him would be analogous to an alienation by a Hindu widow. The same question arose for consideration in a case which went up to the Privy Council whose judgment is found on page 831 in *Vidya Varuthi* v. *Balusami Ayyar*[3]. In that case, an exhaustive review of the aforesaid decisions, as also other decisions, has been made and the final conclusion arrived at by their Lordships is that the permanent lease granted by the Matadhipathi over a part of the general property of the Mutt could enure only for the grantor's lifetime and would be good till his death and would not bind his successor. In that case, the finding of both the Courts in India was that the lease was not made for necessity and that the land in suit was part of the general properties of the Mutt, not being subject to any specific trust. On the basis of this finding of fact, the ultimate conclusion of their Lordships in that case rests. In dealing with the Full Bench decision in *Kailasam Pillai* v. *Nataraja Thambiran*[4] their Lordships state thus at page 845 of *Vidya Varuthi* v. *Balusami Ayyar*[3]:

"All three Judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes, he might be regarded a 'trustee' with regard to that property; but that in the absence of any such evidence, the superior was not a trustee in respect of any part of the endowment."

To the same effect is the view taken in *Muthusamier* v. *Sreemethanithi Swamiyar*[2] which was also considered by the Privy Council. As I have observed above, the land which was granted by the head of the Mutt on permanent lease having been found to be part of the general endowments of the Mutt, and not to have been granted on any specific trust, the position of the Mahant with respect to the land leased was taken to be not that of a mere trus-

1. (1904) I. L. R. 27 Mad. 435: 14 M. L. J. 105.
2. (1913) I. L. R. 38 Mad. 356: 25 M. L. J. 393.
3. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).
4. (1909) I. L. R. 33 Mad. 265: 19 M. L. J. 778 (F. B.).

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tee, but his position would be different, as stated in *Kailasam Pillai* v. *Nataraja Thambiran*[1] and *Muthusamier* v. *Sreemethanithi Swamiyar*[2] referred to in the previous discussion. Now, the final conclusion arrived at by the Privy Council in that case, as stated in the following passage found on page 855 of *Vidya Varuthi* v. *Balusami Ayyar*[3] would be intelligible:

"He was let into possession by Mahant No 1 under a lease which purported to be a permanent lease, but which under the law could enure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity, which does not here arise) a Mahant is incompetent to create any interest in respect of the Mutt property to enure beyond his life."

The aforesaid dictum of the Privy Council in accordance with what their Lordships have stated to be the settled law is in my opinion clearly applicable to the present case. In the plaint, the suit land is simply referred to as belonging to the Mutt, of which the plaintiff is the head. This land is treated simply as part of the general properties of the Mutt. There is absolutely no allegation in the plaint that the suit land is one granted to the head of the Mutt for any specific purpose on a specific trust. As pointed out already, the permanent lease in question granted by the plaintiff as head of the Mutt in respect of the suit land which is only part of the general properties of the Mutt, would therefore enure for his lifetime and would be good to that extent. In the face of the clear pronouncement of the law by the Privy Council in *Vidya Varuthi* v. *Balusami Ayyar*[3] the contention of the learned advocate for the appellant is unacceptable. If the distinction between the position of the head of a Mutt as regards any property shown to have vested in him on specific trust for a specific purpose, and his position as regards the general endowments of the Mutt, be carefully kept in view, there would be no confusion, in the matter of deciding his powers of alienation. As regards a property of the former kind, he would only be a mere trustee and as such an absolute sale or a permanent lease effected by him would be utterly void. The cases relied on by the learned advocate for the appellant in support of his contention that the permanent lease in question in the present case is void seem to me to relate to alienations made by a trustee of an idol or any religious or charitable institution, or a dharmakartha or manager of a temple, or a mutawalli of a wakf who is only a trustee or manager: vide *Nagendranath Palit* v. *Rabindra Nath Deb*[4], *Mayandi Chettiar* v. *Chokalingam Pillai*[5], *Yasim Sahib* v.

1. (1909) I. L. R 33 Mad. 265: 19 M. L J. 778 (F. B.).
2. (1913) I. L. R. 38 Mad. 356: 25 M L. J. 393.
3. (1921) L.R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.).
4. (1925) I L. R. 53 Cal. 132
5. (1903) L. R. 31 I. A. 83: I. L. R. 27 Mad. 291: 14 M. L. J. 200 (P. C.).

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Ekambara Ayyar[1], *Sivaswami Aiyar* v. *Thirumudi Chettiar*[2], *Gajendra Nath Dey* v. *Ashraf Hussain*[3] and *Rama Reddi* v. *Rangadasan*[4]. In such cases, it was held that the alienation would be void. But the principle of those decisions cannot be applied to the head of a Mutt in respect of an alienation made by him of any part of the general endowments of the Mutt, as to which he is not a mere trustee but a functionary having a much higher right with larger power of disposal and administration and a personal interest of a beneficial character, as observed by the Privy Council in *Srinivasa Chariar* v. *Evalappa Mudaliar*[5]. In the case of an alienation which would be void *ab initio*, the alienee usually pleaded adverse possession and limitation, but that plea prevailed in some cases and not in others. For instance, in the case reported in *Rama Reddi* v. *Rangadasan*[4] the view taken was that though the alienation was void, the possession of the alienee would not be adverse to the trustee who granted the permanent lease nor to the idol (the juridical person) which must be deemed to be in perpetual infancy. It is unnecessary to discuss the question of limitation in the present case, as I have held on the authority of the decisions referred to above, that the plaint-mentioned lease will hold good for the lifetime of the grantor (the plaintiff). If the lease is good for the plaintiff's lifetime, the possession of the lessee cannot be adverse as against the plaintiff.

Some stress was laid on the appellant's side on the observation of their Lordships of the Privy Council in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[6]. But that case related to an alleged alienation of the property of a Hindu temple by the trustee thereof. However, there are general observations on page 352 to the effect that the position of the shebait, the manager or trustee of a temple as regards the power to deal with endowed lands of the temple is analogous to the position of a Mahant of a Mutt to deal with the endowed lands of a Mutt. It is stated that, except in a case of unavoidable necessity, they have no power to sell or mortgage the endowed property or grant a permanent lease thereof. After making those observations, their Lordships proceed to state that the law on this subject is well established, quoting among others the decisions of the Privy Council in *Abhiram Goswami* v. *Shyama Charan Nandi*[7] and *Vidya Varuthi* v. *Balusami Ayyar*[8]. But in

1. (1919) 37 M. L. J. 698.
2. (1928) 57 M. L. J. 219.
3. A. I. R. 1923 Cal. 130.
4. (1925) I. L. R. 49 Mad. 543: 50 M. L. J. 589.
5. (1922) L. R 49 I. A. 237: I. L. R. 45 Mad. 565: 43 M. L. J. 536 (P C.).
6. (1923) L.R. 51 I. A. 83: I. L. R. 47 Mad. 337: 46 M. L. J. 546 (P.C.).
7. (1909) L R. 36 I. A. 148: I. L. R. 36 Cal. 1003: 19 M. L. J. 530 (P.C.).
8. (1921) L.R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.).

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these two cases the alienation made by a Mahant or head of a Mutt was not held to be void *ab initio*, but was held to be good for the lifetime of the grantor. What was specifically decided in *Vidya Varuthi* v. *Balusami Ayyar*[1] and *Abhiram Goswami* v. *Shyama Charan Nandi*[2] with the recognition of the distinction between the position of the head of a Mutt in respect of specific trust property and his position in respect of the general properties of the Mutt cannot be deemed to have been abrogated by the general observations made in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[3].

For all the foregoing reasons, I am of opinion that the plaint-mentioned lease will enure for the lifetime of the present plaintiff, the grantor, and will be good till the end of his lifetime. The present suit brought to eject the defendants is therefore unsustainable. In the result, the Second Appeal fails and is dismissed with costs.

[Against this the plaintiff preferred a further appeal under cl. 15 of the Letters Patent.]

T. V. Ramanatha Aiyar for appellant.

V. Balasundaram for respondents.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—This Letters Patent Appeal arises out of a suit filed by the plaintiff-appellant for the recovery of possession of the plaint-mentioned *manai* together with arrears of rent from the defendants to whose ancestor this site was granted by the plaintiff under a registered lease deed, Ex. A, dated the 3rd July, 1891. The appellant's case is that he is the head of Sivaprakasa Swamigal Mutt, that the suit property which is situated in Madappuram village belongs to the aforesaid Mutt and that it was leased out to the father of defendants 1 to 3 who took it for erecting a house upon it for his occupation. The plaintiff's claim was resisted by the defendants on several grounds. It was urged that the lease granted by the plaintiff was a permanent lease, that no default was made in the payment of rent, that the plaintiff's suit was barred by limitation and that in case of eviction a sum of Rs. 1,000 should be paid as compensation for the house built on the suit site. The Lower Courts found that the lease granted under Ex. A was a permanent lease. The Subordinate Judge

1. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.).
2. (1909) L. R. 36 I. A. 148: I. L. R. 36 Cal 1003: 19 M. L. J. 530 (P.C.).
3. (1923) L. R. 51 I. A. 83: I. L. R. 47 Mad. 337: 46 M. L. J. 546 (P.C.).

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found that the permanent lease was not granted for any benefit or necessity of the Mutt; but, on a consideration of the case-law upon the point, he held that the lease in question was good till the end of the plaintiff's lifetime, whatever might be the binding character of it so far as the plaintiff's successor was concerned. The Subordinate Judge, therefore, dismissed the plaintiff's suit, confirming the decision of the first Court. On second appeal, Sundaram Chetty, J., upheld the view of the Subordinate Judge and dismissed the appeal.

It is clear from the plaint that the claim was put forward in respect of this property as being the property with which the Mutt was generally endowed and therefore the position does not fall to be considered from any other point of view. The position, therefore, is that the appellant, the head of the Mutt, is not in the position of a trustee holding property vested in him or in the religious institution for any specific purpose. He occupies the position of the head of a Mutt not that of a trustee, and our learned brother in Second Appeal rightly draws the distinction between the two classes of persons. It is argued here that it is well settled that, though the head of a Mutt may grant a lease of property of the Mutt, he can only do so for his lifetime and that any alienation beyond his lifetime is invalid and, it is argued also, void *ab initio*. It is, of course, well settled that the head of a Mutt can grant a lease of the property of the Mutt for his lifetime. In this case we are not dealing with an alienation made by the predecessor of the plaintiff. It was the plaintiff himself who granted the lease and he granted a permanent lease. What is the position? Is that lease at any rate valid for his lifetime or is he entitled during his lifetime to go behind what he has done and to have that lease declared invalid? It is worthy of note that except by inference even in this suit there is no claim for any such declaration. It seems to be merely a suit for possession but, in my opinion, even had there been a claim in this suit or a claim put forward by the plaintiff to set aside his alienation, it must have failed. The whole question really turns upon what is the effect of an alienation by the head of a mutt beyond his lifetime. What is to happen to a permanent lease granted by the head of a mutt? It is argued here, as before stated, on behalf of the appellant, that the effect is to render the whole lease void. It is argued that the Court cannot separate the good part of the lease from

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the bad part; and in support of this proposition a decision of this Court has been referred to, viz, *Andalam Hanumanthu* v. *Peruri Kristabrahmam*[1], a decision of Kumaraswami Sastri, J., where he held that an alienation made by a trustee of wakf property was void *ab initio*. Whatever may be the position of a trustee of a wakf, we are not here faced with that position at all. We are faced with an alienation made by the head of the mutt and, in my opinion, the decision referred to is of no application here; and even if it were, it is not a decision which I should be inclined to follow much though I respect the decision of that very learned Judge. But, in my opinion, we are not called upon to say whether that decision was a correct one or not. It is perfectly clear to me as it was indeed to Sundaram Chetty, J., that, if the head of a mutt grants a permanent lease, the lease at least enures for his lifetime and is a valid one. This is what was held in *Vidya Varuthi* v. *Balusami Ayyar*[2] and it was there held amongst other things that the endowments of a Hindu mutt are not "conveyed in trust," nor is the head of a mutt "a trustee" with regard to them save as to any specific property proved to be vested in the head for a specific and definite object. This case, of course, is very much in point in distinguishing the position of a trustee and what he does from the position of the head of a mutt and what he does. It was held also in that case that where the head of a mutt has granted a permanent lease the lessee cannot claim adverse possession as against the grantor of that permanent lease although different considerations may arise when the successor of the grantor comes upon the field and adverse possession may at any rate be obtained against him. The position is dealt with at page 854 where the argument on the question of limitation is considered as follows:—

> "That article (Art. 144) declares that for a suit 'for possession of immovable property or any interest therein not hereby (*i.e.*, by the schedule) otherwise specially provided for' the period of limitation is 12 years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began He was let into possession by Mahant No 1 under a lease which purported to be a permanent lease, but which under the law could enure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity, which does not here arise) a Mahant is incompetent to create any interest in respect of the mutt property to enure beyond his life."

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1. (1927) 26 L. W. 202.

2 (1921) L. R. 48 I. A. 302: I.L.R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).

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It was accordingly held that the lessee as against Mahant No. 1 did not acquire a title by adverse possession as he was unable to prescribe against Mahant No. 1 who was, although purporting to grant a permanent lease, granting a lease which was to enure only for his lifetime. This case was considered in a more recent decision of the Privy Council in *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[1]:

"A further argument has been put forward to the effect that the period of limitation begins to run afresh as each new trustee succeeds to the office, and in support of that view reliance is placed on the case of *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*[2] and on the case of *Vidya Varuthi* v. *Balusami Ayyar*[3] but those authorities do not assist the appellant. In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent mokurrari lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life and a grant made for a longer period is good, but good only to the extent of his own life-interest."

In both these cases there is, in my opinion, clear authority for the view taken by Sundaram Chetty, J., that although the permanent lease was invalid it was good at least for the lifetime of the plaintiff.

For these reasons, I agree with the judgment of Sundaram Chetty, J. and dismiss this Letters Patent Appeal with costs.

Bardswell, J.

Bardswell, J.—I agree with my Lord the Chief Justice and have nothing to add.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

Govinda Pādayachi .. *Appellant* (Petitioner-Plaintiff)*

v.

Velu Murugayya Chettiar and another .. *Respondents (Respts.-Defendants).*

Govinda Padayachi *v.* Velu Murugayya Chettiar.

Civil Procedure Code (V of 1908), Ss. 47 and 151 and O. 21, R. 90—Sale in execution of decree—Refusal to confirm sale—Appeal and second appeal, whether competent—Sale of more lots of properties than would satisfy decree-holder—Court's powers under S. 151 of the Civil Procedure Code to refuse to accept bids when notice of the fact of more lots than necessary being sold not brought to it.

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* C. M. S. A. No. 168 of 1930. 17th January, 1933.

1. (1923) L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 at 756: 45 M.L.J. 588 (P.C.).
2. (1911) L. R. 38 I. A. 76: I.L.R. 38 Cal. 526: 21 M. L. J. 1145 (P. C.).
3. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).

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Where the executing Court being approached under S. 151 of the Civil Procedure Code passes an order refusing to confirm a sale in execution, there is an appeal and a second appeal against the order of the executing Court.

Akshia Pillai v. *Govindarajulu Chetti*, (1924) 47 M. L. J. 549, followed.

Where the executing Court instructed the Deputy Nazir to sell only so much of the properties of the judgment-debtor as would suffice to satisfy the decree but the latter sold more, while the sale of some other lot alone would satisfy the decree, which fact was not brought to the notice of the Court and the Court in consequence accepted the bids of all the properties,

Held, that the Court can, where its orders have not been carried out, and it has been misled, correct its own error under its inherent powers reserved under S. 151 of the Civil Procedure Code.

Mul Raj v. *Bura Mal*, (1931) I. L. R. 12 Lah. 602, followed.

Moulvie Abdul Hye v. *Macrae*, (1874) 23 W. R. 1 and *Satia Nand* v. *Jhangi Ram*, A. I. R. 1932 Lah. 238, distinguished

Appeal against the order of the District Court of East Tanjore at Negapatam, dated 5th March, 1930 and made in A. S. No. 146 of 1928 preferred against the order of the Court of the District Munsif of Shiyali, dated 14th February, 1928 and made in E. P. No. 138 of 1926 in O. S. No. 334 of 1923.

C. A. Seshagiri Sastri for appellant.

S. Rajaraman for respondents.

The Court delivered the following

JUDGMENT.—In this case the auction purchaser is the Appellant. He got a decree which on the date of sale amounted to Rs. 2,127 odd. The judgment-debtor was an undivided member of a joint Hindu family entitled to an undivided one-fifth share in the family property. At the request of the appellant the property which was the total property of the family was divided into two lots for sale.

The Court had given standing instructions that in Court sales no bid was to be finally accepted before the Court had sanctioned it. The District Munsif had also informed the Deputy Nazir, who conducted the sale, that in this sale he should not sell more than would realize the decree amount. The first lot was valued at about Rs. 940. It had a usufructuary mortgage on it for Rs. 400.

It was put up for sale first and the decree-holder purchased it for Rs. 950. Then the second lot was put up and he purchased this for Rs. 2,275. When the Dy. Nazir brought the papers to the Court in the evening for confirmation he told the District Munsif that the bids had fetched more than the

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Commissioner's valuation; but he did not inform him that the bid for the second property was enough to cover the decree amount. The District Munsif not realizing this confirmed both bids. The decree-holder paid the balance of about Rs. 1,000 due into Court on the same day and on the next day the District Munsif discovered his error. The judgment-debtor Ramaswami Chetti had died by the time of the sale and his legal representatives were his two sons, of whom one was said not to be in British India.

On a notice by Court the other son appeared and said he was willing that the sales of both the lots should be set aside and at least that of lot No. 1 should be set aside. The District Munsif asked the appellant to put in a counter-petition which he did stating that the sale of both lots should be confirmed. The District Munsif under S. 151 set aside the sale of lot No. 1 and confirmed that of lot No. 2. Appellant filed an appeal to the District Judge who confirmed the order.

Against this he has put in an Appeal and a Civil Revision Petition to this Court. As there is a Civil Revision Petition it is immaterial whether an appeal lies; but Jackson, J., held in *Akshia Pillai* v. *Govindarajulu Chetti*[1] that if a Court is approached in execution under S. 151 and passes an order of this kind there is an appeal and a second appeal, and in this very case he directed the Civil Revision Petition to be put up with the appeal.

The sole ground taken by the appellant is that as there was no application by the judgment-debtor under O. 21, R. 90, Civil Procedure Code, to set aside the sale for the irregularity, the Court had no power to do so under S. 151. He relies on the general principles stated in *Panchanam Singha Roy* v. *Dwarka Nath Roy*[2], *Gopal Chandra Mukerji* v. *Notobar Kundu*[3], *Ghusnavi* v. *The Allahabad Bank, Ltd.*[4] and *Joshi Shib Prakash* v. *Jinghuria*[5] that S. 151 is only applicable where there is no remedy prescribed by the Code. *Panchanam Singha Roy* v. *Dwarka Nath Roy*[2] does not help appellant at all. In *Gopal Chandra Mukerji* v. *Notobar Kundu*[3] the order under S. 151 was upheld; in *Joshi Shib Prakash* v. *Jinghuria*[5] the party

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1. (1924) 47 M. L. J. 549
2. (1905) 3 C L. J. 29 at 31.
3. (1912) 15 I. C. 53.
4. (1917) I.L.R. 44 Cal. 929 at 936 (F.B.).
5. (1923) I. L. R. 46 All. 144.

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wilfully neglected to avail himself of the remedy open under the Code.

I think the authorities are clear that the Court can, where its orders have not been carried out, and it has been misled, correct its own error.

The only two cases quoted for the appellant which seem to me to bear at all on this matter are *Moulvie Abdul Hye* v. *Macrae*[1] and that case seems to be really against him. There a Subordinate Judge had in execution ordered the sale of several factories in different lots. The District Judge then removed the execution proceedings to his own Court and ordered that the factories should all be sold as one lot. It was held that the District Judge had no power to call up the execution proceedings to his own Court or to pass the order he did, that the judgment-debtor had suffered material injury in consequence, and the learned Judges set aside the sale under S. 256 which corresponded to O. 21, R. 90. The decision was in 1875 long before S. 151 had been introduced in the Code of 1908, though the existence of such a power in the Court had been recognised.

The other case, *Satia Nand* v. *Jhangi Ram*[2], quoted for the appellant, is not parallel. In that case a judgment-debtor who made an application under O. 21, R. 89 to set aside a sale did not deposit the 5 per cent. required, and the Court under S. 151 made an order setting aside the sale. It was held that it had no power to do so. There was no question there of the power of the Court to rectify its own mistake.

On the other hand there are several cases which are clearly in respondents' favour. In *Mul Raj* v. *Bura Mal*[3] it was held that "when the Court is empowered to make an order, it has inherent jurisdiction to see that the order is carried into effect. When therefore an execution sale admittedly contravened the express direction of the Court then the Court can *suo motu* set aside the sale under S. 151."

That case exactly applies here.

Then there is *Raghavachariar* v. *Murugesa Mudali*[4] quoted by both the Courts below. It was sought to distinguish

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1. (1874) 23 W. R. 1. 2. A. I. R. 1932 Lah. 238
3. (1931) I. L. R. 12 Lah 602
4. (1923) I. L. R. 46 Mad. 583 : 44 M. L. J. 680.

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this case by saying that there the concealment was a fraudulent one by the purchaser; but I do not think that this is sufficient to make inapplicable the principle laid down by Chief Justice Schwabe there about "non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court" justifying an order by Court under S. 151.

While it is not suggested that there was anything intentional in the action of the Dy. Nazir in failing to appraise the Court that the bid for lot No. 2 was sufficient to cover the decree amount, it was clearly his duty to have done so in the face of the express instructions issued, and the Court was misled by his failure to do so.

With regard to the argument of hardship raised that if lot No. 1 does not fall to the share of the deceased judgment-debtor at a family division the appellant will be at a disadvantage, it was pointed out by the Lower Appellate Court that the separation of the property into two lots was at appellant's own request and so he cannot complain of any results which may flow from it.

In my opinion the order of the Courts below was correct.

The Second Appeal fails and is dismissed with costs (one set).

K. C. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

Thakur Jagdishwar Dayal Singh .. *Appellant**

v.

Pathak Dwarka Singh and others .. *Respondents.*

P. C.

Jagdishwar Dayal Singh *v.* Dwarka Singh.

Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908), Ss. 208 and 214—Bengal Rent Recovery (Under-tenures) Act (VIII of 1865), S. 16—Omission to implead as defendant one of the tenants in suit for arrears of rent—Effect of—Sale of the whole tenure in execution of the rent decree, ultra vires—*Jurisdiction of Civil Court not ousted.*

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* P. C. Appeal No. 99 of 1930 14th February, 1933.
Patna Appeal No. 18 of 1929.

P. C.

Jagdishwar Dayal Singh *v.* Dwarka Singh.

In order to justify a sale of the tenure under the provisions of S. 208 of the Chota Nagpur Tenancy Act, 1908, all parties interested in the whole 16 annas of the tenure must be joined as defendants in the rent suit, or be sufficiently represented by parties joined as defendants.

Chamatkari Dasi v. *Triguna Nath Sardar*, (1913) 17 C. W. N. 833 and *Chandra Nath Tewari* v *Protap Udai Nath Sahi*, (1913) 18 C. W. N. 170, applied

Profulla Kumar Sen v. *Nawab Sir Salimulla Bahadur*, (1918) 23 C. W. N. 590, doubted

Doolar Chand Sahoo v. *Lalla Chabeel Chand*, (1878) L. R 6 I. A. 47, distinguished.

Held, accordingly, that where, by reason of the omission to implead one of the tenants as defendant in the rent suit, the whole interest in the tenure was not represented before the Court, the decree obtained in the suit was not a rent decree and could not be executed as such. The order for sale of the whole tenure was, therefore, *ultra vires* of the Revenue Court and the sale under S. 208 was without jurisdiction. It followed that the appellant by his purchase of the tenure in execution of such decree did not (by virtue of S 16 of the Bengal Rent Recovery (Under-tenures) Act, 1865) acquire it free from incumbrances.

The sale under S. 208 of the Chota Nagpur Tenancy Act being thus *ultra vires*, the jurisdiction of the Civil Court was not excluded by S. 214 of the Act.

Judgment of the High Court, Patna, reported in *Pathak Harbans Singh* v. *Thakur Jagdishwar Dayal*, (1928-29) I. L. R. 8 Pat. 620, affirmed.

Appeal No. 99 of 1930 from a decree of the High Court, Patna, dated the 17th January, 1929, which reversed a decree of the Additional Subordinate Judge of Palamau, dated the 17th December, 1925.

The question for decision in the appeal was, whether under the Chota Nagpur Tenancy Act (Bengal Act VI of 1908), the landlord was entitled to proceed in a suit for arrears of rent in respect of a tenure only against the tenants recorded in his *sherista* and was not bound to implead one who had not got herself registered in his books, and whether a decree passed against the recorded tenants alone was a valid rent decree and would have all the consequences of a rent decree.

The High Court, differing from the Trial Judge, answered the question in the negative.

Sir Dawson Miller, K. C. and *Wallach* for appellant.

G. D. McNair for respondents.

14th February, 1933. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is an appeal from a decree of the High Court of Judicature at Patna, dated the 17th January, 1929, which reversed a decree of the Additional Subordinate Judge of Palamau, dated the 17th December, 1925, and decreed the plaintiffs' suit with costs.

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The appellant, who is defendant No. 1 in the suit, is the proprietor of the Lokiya Narainpur estate, which includes villages Maran, Rouni, Bedra and an 8 annas share of Chowreah. The rule of primogeniture obtains in the appellant's family. At some time prior to 1865 his ancestor made a khorposh grant to the ancestor of original defendant No. 2, of defendants Nos. 3 and 4, and of Maheshanand, the deceased husband of defendant No. 5. Original defendant No. 2 died pending suit and his two sons were substituted. Defendants Nos. 2, 3 and 4 had an 8 annas share in the khorposh subjects and Maheshanand had the remaining 8 annas share.

The contesting respondents in this appeal are the plaintiffs in the suit, and they are in possession of mokurrari rights in mouza Maran, which forms part of the khorposh lands, under leases executed in 1865 in favour of their predecessors-in-title by the predecessors-in-title of defendants Nos. 2, 3 and 4.

About 1910 Maheshanand died without issue but leaving a widow, defendant No. 5. The name of the latter was entered in the record of rights, which was completed in 1920, as the holder of an 8 annas share of the khorposh lands, but she did not take any steps to have her name entered in place of that of her deceased husband in the sherishta of the landlord, as prescribed by S. 11 of the Chota Nagpur Tenancy Act, nor did she pay any rent to him in respect of the tenure.

In 1919 the appellant brought a suit in the Court of the Munsif Deputy Collector, Palamau, against defendants 2, 3 and 4 in the present suit for arrears of rent in respect of the khorposh tenure for the years 1916—1919, and obtained a decree for these arrears on the 26th February, 1920. Present defendant No. 5 was not joined as a defendant in that suit. In execution of the decree the tenure was put up for sale and was purchased by the present appellant, the decree-holder, on the 15th September, 1922. The sale was confirmed on the 25th October, 1922, and, on the 7th December, 1922, the appellant obtained a sale certificate under S. 11 of the Bengal Rent Recovery Act (VIII of 1865). In course of the proceedings under that section for putting the appellant into possession, some of the plaintiffs in the present suit took objection on the ground that the decree in execution of which the tenure had been put up for sale was not a rent decree and that what had passed by the auction was only the interest possessed by the

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defendants called in that suit. The Deputy Commissioner sustained the objection but the Commissioner reversed that decision, and the Board of Revenue upheld the Commissioner's decision on the ground that the decree was a rent decree and that the sale was a sale of the tenure under S. 208 of the Chota Nagpur Tenancy Act.

The present suit was accordingly instituted on the 2nd August, 1924, seeking a permanent injunction restraining the appellant from recovering possession of mouza Maran from the plaintiff-respondents.

Though the allegations of fraud against the appellant were held by the Subordinate Judge to have failed, and they have not been persisted in, there can be no doubt that, when he obtained the decree of 1920, the appellant was fully aware of the interest of defendant No. 5 in the khorposh lands.

In the first place, the appellant maintains that the failure of defendant No. 5 to have her name entered on the sherishta, along with the fact that she had never paid rent or been recognised by him as a tenure-holder, entitled him to proceed to the sale of the tenure under S. 208 without joining her as a defendant. The Subordinate Judge accepted this view and dismissed the suit, but this contention was rejected by the High Court. Their Lordships agree with the High Court. No such sanction as forfeiture of rights in the tenure in respect of failure to comply with the provisions of S. 11 is provided by the Act; such failure only affects the transferee's power to recover rent from his under-tenants as provided in Sub-s. 4.

Their Lordships agree with the High Court that in order to justify a sale of the tenure under the provisions of S. 208 of the Chota Nagpur Tenancy Act, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented by parties joined as defendants. In their Lordships' opinion, the cases decided on the construction of S. 159 of the Bengal Tenancy Act, 1885, as regards this point are equally applicable to the construction of S. 208 of the Chota Nagpur Tenancy Act. In particular, reference may be made to the judgment of Jenkins, C.J., in *Chamatkari Dasi* v. *Triguna Nath Sardar*[1] in which he refers to the earlier cases.

1. (1913) 17 C. W. N. 833.

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The principle of these decisions was accepted as applicable to a sale under S. 208 of the Chota Nagpur Tenancy Act in *Chandra Nath Tewari* v. *Protap Udai Nath*[1]. The decision in *Profulla Kumar Sen* v. *Nawab Sir Salimulla Bahadur*[2] in which there appears to have been no citation of authority, is difficult to reconcile with the above cases, and must be doubted. The appellant relied on certain passages in the judgment of this Board in *Doolar Chand Sahoo* v. *Lalla Chabeel Chand*[3]. The sale in that case was clearly not a sale under the Bengal Tenancy Act, 1869, and the present question did not arise for decision; any incidental references to a sale under the Act of 1869 cannot be regarded as a considered decision on the present question. The question of representation does not arise in the present case, for the appellant does not maintain that the defendants joined in the rent suit of 1919 in any way represented the interest of the present defendant No. 5.

There can be no doubt that the sale in the present case purported to take place by virtue of sub-section (1) of S. 208 of the Chota Nagpur Tenancy Act, which—so far as material—provides as follows:—"When a decree passed by the Deputy Commissioner under this Act is for an arrear of rent due in respect of a tenure or holding, the decree-holder may apply for the sale of such tenure or holding, and the tenure or holding may thereupon be brought to sale, in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery (Under-tenures) Act, 1865, and all the provisions of that Act, except Ss. 12, 13, 14 and 15 thereof, shall as far as may be apply to such sale." It may be noted that, under S. 16 of the Act of 1865, the purchaser at the sale of the under-tenure is to acquire it free from all incumbrances created by the under-tenure holders without the landlord's written consent or ratification. Hence the plaintiffs' concern to get rid of any sale under S. 208.

The appellant challenges the jurisdiction of the Civil Court to interfere with the sale that has taken place, and bases this contention on S. 214 of the Chota Nagpur Tenancy Act, which, so far as material, provides as follows:—

"214. No suit or application shall be entertained by any Court to set aside or to modify the effect of—(a) any sale made under this Act, save

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1 (1913) 18 C. W. N. 170.
2. (1918) 23 C. W. N. 590.
3. (1878) L. R. 6 I. A. 47.

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under S. 211, S. 212 or S. 213, or on the ground of fraud or want of jurisdiction."

Sections 212 and 213 have no bearing in the present case, but S. 211, which requires consideration, is as follows:—

"211. (1) If, before the day fixed for the sale of any tenure or holding in pursuance of S 208, a third party appears before the Deputy Commissioner and alleges that he, and not the person against whom the decree has been obtained, was in lawful possession of, or had some interest in, the tenure or holding when the decree was obtained, the Deputy Commissioner shall examine such party according to the law for the time being in force relating to the examination of witnesses; and if he sees sufficient reason for so doing, and if such person deposits in Court or gives security for the amount of the decree, the Deputy Commissioner shall stay the sale, and shall, after taking evidence, adjudicate upon the claim:

Provided that no such adjudication shall be made if the Deputy Commissioner considers that the claim was designedly or unnecessarily delayed:

Provided also that no transfer of a tenure shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner.

* * * * *

"(2) The party against whom judgment is given by the Deputy Commissioner under Sub-s. (1) may, at any time within one year from the date of the judgment, bring a suit in the Civil Court to establish his right, and if the sale has been held, to have it set aside on payment by him of the amount of the decree."

This section clearly relates to a case where parties interested in the whole 16 annas of the tenure have been joined as defendants, but a third party claims an interest in room and place of one or more of the defendants; it would not apply in the present case, where the whole interest is not covered by the parties joined as defendants, and the party omitted should have been joined in addition.

In order to take advantage of S. 214 the appellant must first establish that the sale was a sale made under Chapter XVI of the Act, which includes Ss. 135 to 229, which in effect is a question of jurisdiction. Under Chapter XVI of the Act a statutory jurisdiction is conferred on the Revenue Courts. but that jurisdiction must be exercised within the statutory powers conferred. If then, as already stated, it is not competent to order a sale of the tenure under S. 208 unless the whole interests in the tenure are represented before the Court, it is clear that the order for sale of the tenure in the present case was *ultra vires* of the Revenue Court, and it follows that the sale was not "made under this chapter" and was outside the jurisdiction of that Court. This view is confirmed by an examination of the terms of the decree of 1920 for arrears of rent, for the claim

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decreed is "on account of arrears of rent and cesses with interest in respect of khorposh *held by the defendants* in mouza Madan, Bidra, Rano and Chareya," and the decree is thus only apt to attach the interest of the defendants in the tenure, and is no sufficient warrant for a sale of the whole tenure under S. 208.

Accordingly, their Lordships are of opinion that the jurisdiction of the Court is not excluded by S. 214, as the sale under S. 208 was *ultra vires*; and that, consequently, the incumbrances on the tenure were not affected.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court of the 17th January, 1929, should be affirmed, and that the appeal should be dismissed with costs.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *W. W. Box & Co.*

K. J. R. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD ATKIN, LORD MACMILLAN AND SIR JOHN WALLIS.

R. S. Rochi Ram .. *Appellant**

v.

Faizullah Khan and others .. *Respondents.*

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Rochi Ram v. Faizullah Khan.

Contract Act (IX of 1872), S. 25—Suit for partnership accounts barred—Subsequent settlement of accounts—Agreement to abide by—Consideration for—Limitation Act (IX of 1908), Art. 106.

It is open to all the partners of a dissolved partnership to meet together and come to a final settlement of the partnership accounts, although a suit for rendition of those accounts has then become barred by time under Art. 106 of the Limitation Act. There is ample consideration in such a case, namely, in the mutual promises made by the partners to abide by such settlement, and a suit, on the basis of the settlement thus arrived at, is maintainable.

Consolidated appeals No. 45 of 1930 from two decrees of the Court of the Judicial Commissioner, North-West Frontier Province, dated the 28th January, 1929, affirming two decrees of the District Judge, Dera Ismail Khan, dated the 12th March, 1928.

*P. C. Appeal No. 45 of 1930. 30th January, 1933.

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The questions raised on the appeal were: (1) whether or not there was a settlement of accounts arrived at with the consent and concurrence of the partners about the end of 1924, (2) assuming there was a settlement arrived at, could it be the basis of a valid cause of action.

Wallach for appellant.

De Gruyther, K. C. and *Parikh* for respondents.

30th January, 1933. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—These are two appeals from a judgment and two decrees of the Court of the Judicial Commissioner of the North-West Frontier Province, in which the plaintiffs were Faizullah Khan in the first suit and Mauladad Khan, since deceased, in the second suit, who were suing to recover their shares on a settlement of certain partnership transactions between them and the respective defendants. It appears that the plaintiffs had been partners in a contract for supply and transport, which had been obtained from the Commissariat Department, and which ran from September, 1919 to March, 1920. There was a second contract obtained afterwards in continuation of the first, but with that their Lordships are not concerned in these two suits. The accounts of the parties were not finally adjusted until the year 1924, and at that date it is alleged by each of the plaintiffs that a settlement was arrived at between all the partners under which each plaintiff became entitled to the amount of money for which he is suing, and an account is produced which is in the handwriting of the principal defendant, Rochi Ram, who is the appellant here, and who appears to have been the manager of the particular business for the partners, in which a statement is drawn up of the amount due standing to the credit of the partners, and the shares of the respective partners are shown under a heading "To be distributed," the shares being the shares for which the two plaintiffs sue. This settlement is said to have been arrived at towards the end of 1924, and the suits were brought in 1927, so that no question of limitation could possibly arise in respect of the amount due under the settlement. There are two defences: One is that no settlement was in fact arrived at, but there was a draft settlement that was never signed by the parties and was not intended to be a final arrangement between them. Upon that matter, both the Trial Judge and the Judicial Commissioner

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have found that in fact a final settlement was arrived at. There seems to have been ample evidence upon which they could so find, and these are concurrent findings of fact with which the Board would not interfere except on very special grounds. Their Lordships see no reason at all for dissenting from this view, which is the view in fact taken by the two Courts and, therefore, it must be taken that there was at the end of 1924 a final settlement of the partnership accounts under which the respective plaintiffs would have become entitled to the sums for which they respectively sued.

The only other point that was raised was that there was no consideration for such a settlement because it is said that Art. 106 of the Limitation Act provides a period of limitation for suits for an account and share of profits of a dissolved partnership, the period of limitation being three years, and that the time from which the period begins to run is the date of the dissolution, and inasmuch as this settlement was arrived at more than three years from what is said to be a dissolution of the partnership, namely, the determination of the joint adventure, it is said that the partners had only agreed to settle something which they were not bound to account for. In fact this seems to be due to a misapprehension of the law in respect of consideration. It may be true, and their Lordships say nothing on that point one way or the other, that one partner could only have asked for an account under Art. 106 within three years of March, 1920, but that has no bearing at all upon the question when in fact they have come together and have agreed to an account between themselves, and have made mutual promises to abide by such settlement. There is ample consideration in such a case for the promise given by each partner in the mutual promises made by the other partners ; and the fact, if it be a fact, that they could not have sued originally for an account, seems to have nothing to do with the situation which arises when they do meet together and agree that an account shall be taken and make mutual promises upon that footing.

The Court of the Judicial Commissioner, in their Lordships' opinion, was quite correct in coming to the conclusion that in this case there was consideration for the contract, and in the result, therefore, it follows that the judgments below were right, and that these appeals must be dismissed with costs,

and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Stanley Johnson and Allem.*

K. J. R. ——— *Appeal dismissed.*

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Lord Atkin.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD TOMLIN, LORD THANKERTON AND SIR LANCELOT SANDERSON.

Raja Kirtyanand Singh and others .. *Appellants**

v.

Raja Prithi Chand Lal Chaurhury .. *Respondent.*

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Kirtyanand Singh *v.* Prithi Chand Lal Chaurhury.

Civil Procedure Code (V of 1908), S. 48 (1) (b)—"Subsequent order" directing payment of money—Nature of—Limitation Act (IX of 1908), S. 15 (1)—Order passed in another suit directing decree-holder to wait for some time—Exclusion of that period—Permissibility.

The "subsequent order" directing payment of money, contemplated by S. 48 (1) (*b*), Civil Procedure Code, 1908, must be an order in the suit in which the decree is made, and an order which directs payment by the debtor or the surety of money in respect of the judgment-debt.

Under the Limitation Act, 1908, S. 15 (1), in order to exclude the period during which the execution of the decree had been stayed by injunction or order, there must be an order staying execution and, *semble*, it must be an order passed during the pendency of an application for execution of the decree. Where an order was passed, not in the suit in which the decree was made, but in another suit, and the order did not stay execution at all but merely said that the decree-holder was to wait for some time for payment of the decretal amount,

Held, that it was not in any sense within the meaning of the section, a stay of the execution by injunction or order.

Judgment of the High Court, Patna, reported in *Kirtyanand Singh* v. *Pirthichand Lal Choudhri*, A.I.R. 1929 Pat. 597: 120 I. C. 315, affirmed.

Appeal No. 126 of 1930 from a decree of the High Court, Patna, dated the 10th July, 1929, which in effect affirmed an order, dated the 19th September, 1927, of the Court of the Subordinate Judge of Monghyr.

The question for determination was whether the appellants-decree-holders' application made on the 13th July, 1927, for execution of a decree, dated the 1st April, 1914, as against the respondent (surety) was barred by S. 48 of the Civil Procedure Code, and whether limitation was saved, under S. 15 (1), Limitation Act, by reason of an order staying execution.

It was provided by the decree in question that the plaintiffs-appellants should not take out execution of the decree "till March,

*P. C. Appeal No. 126 of 1930. 22nd November, 1932.
Patna Appeal No. 46 of 1929.

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1915". The present respondent was not a judgment-debtor under that decree, but was liable as a surety. Between 1915 and 1925 the plaintiffs made a series of applications against the judgment-debtors for execution of their decree, whereby the decree was satisfied only in part. On the 13th July, 1927, the plaintiffs filed the application, giving rise to this appeal, against the surety (the present respondent) for the recovery of the balance of their decree. The Subordinate Judge rejected the application, holding that it was barred by S. 48, Civil Procedure Code, having been made more than 12 years from the 1st April, 1915, when the decree became capable of execution. On appeal, the High Court affirmed the order of the Subordinate Judge. The learned Judges of the Appellate Court further held that the application was also barred by the Limitation Act, Art. 182, clause (5). They considered that a surety did not become a joint debtor with the principal judgment-debtor within the meaning of Expln. 1 to Art. 182, following in this respect the rulings reported in *Narayan* v. *Timmaya*[1], *Raja Raghunandan Prasad Singh* v. *Raja Kirtyanand Singh Bahadur*[2] and *Birendra Chandra Tulsi Charan Ghose*[3] and they therefore held that the previous applications for execution, made against the judgment-debtors alone, did not save limitation as against the surety (the present respondent).

Against the decree of the High Court, the plaintiffs-decree-holders appealed to His Majesty in Council.

Sir Dawson Miller, K. C. and *S. Hyam* for appellants.

Dunne, K. C. and *Wallach* for respondent.

22nd November, 1932. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal from a decree of the High Court at Patna, which affirmed an order, dated 19th September, 1927, of the Court of the Subordinate Judge of Monghyr.

The question arises in this way. On the 1st April, 1914, a decree was made in certain rent suits by which by consent the present appellants, or their predecessors, obtained a decree for Rs. 1,84,521, besides further interest thereon at 8 annas per cent. per month.

It was provided by the decree that the plaintiff should not take out execution of the decree until March, 1915, so that there was a year's suspension.

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1. (1906) I. L. R. 31 Bom. 50. 2. (1928) I. L. R. 8 Pat. 310.
3. (1926) 85 I. C. 657.

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The present respondent was a consenting party to the decree in his capacity as surety. The result of that apparently is that the decree can under S. 145 of the Civil Procedure Code be executed against him as though he were a party to the suit and the principal debtor.

Having obtained that decree, the plaintiffs made a number of applications for execution.

The first was made on the 23rd June, 1915, and apparently was struck off on the 24th June, 1916, without there being any satisfaction of the decree.

A second application was made on the 10th September, 1918, and that again was struck off on the 25th March, 1919, without any satisfaction of the decree.

A third application was made on the 10th April, 1919; but in the meantime the defendants in the rent suits who apparently were, or claimed to be, interested in the Srinagar Raj, as one of their principal assets, had a suit commenced against them by a lady of the family, the nature of which does not very clearly appear but which was evidently a suit for the protection of the property in the interests of the family.

In the course of that suit apparently in January, 1920, a receiver was appointed, and on the 31st January an application was made in that suit by the appellants in the absence of the judgment-debtors and of the surety, which resulted in an Order in that suit for payment of Rs. 9,000 half-yearly by the receiver in that suit to the appellants in respect of their judgment-debt in the rent suits.

In fact, the receiver paid nothing.

On the 24th February, 1920, the third application for execution in the rent suits which was up till that moment pending, was struck out. About this time it appears that at the instance of the receiver in the Raj suit the proceedings in the rent suits were transferred from Monghyr, where they had theretofore been conducted, to Bhagalpur where the Raj suit was proceeding; and presently an application was made by the appellants in the Raj suit asking in effect that either the receiver might pay their debt, or that they might levy execution on the property of the Raj in the hands of the receiver.

That application seems to have come before the Subordinate Judge on many occasions, and on each occasion he saw fit

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to postpone decision and ultimately, according to the Order Sheet, on the 16th September, 1922, he made an order that the appellants were to wait for some time for payment of the larger decree, and he directed an account of the smaller decree. That only means that the compromise decree was made up of two separate sums, a bigger sum and a smaller sum; so that the result of that was that they were left with nothing in the main to satisfy their debt. At that moment when that order was made, it is to be observed that there were in fact no execution proceedings pending at all. The appellants appealed against the last-mentioned order and on the 16th April, 1923, that is seven months afterwards, the order was set aside.

On the 15th May, 1923, that is a month after the order was set aside, the appellants made their fourth application for execution in the rent suits. That was struck off on the 8th June, 1923, and there is no information as to why it was so struck off, although it appears that in the meantime some sum had been paid to the appellants by the receiver in the Raj suit.

On the 11th June, 1923, that is three days after the fourth application was struck off, the appellants made a fifth application for execution and that was struck off on the 30th March, 1926. But in the meantime, in some way or another, they had succeeded in getting an order for the sale of the Raj property, presumably in the Raj suit, and the Raj property was in fact sold and something over a lakh of rupees was realised and paid to them in satisfaction *pro tanto* of their judgment-debt. But there remained a substantial sum still owing to them.

On the 15th June, 1925, they made a sixth application for execution in the rent suits. Their Lordships have no particulars of that application, or what happened to it, it probably suffered the fate of its predecessors and was struck off without any particular result.

On the 13th July, 1927, there followed a seventh application for execution in the rent suits. It is to be observed that the six applications which have been mentioned up to this point were all applications against the judgment-debtors. The seventh application was, however, an application against the surety. This application founds the present appeal before their Lordships' Board, because objection was taken to it that it was out of time. That objection was upheld in both Courts below, and

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it is against that conclusion that the present appellants have appealed to His Majesty in Council.

Now two points are made by the appellants. The first is that though under S. 48 of the Code of Civil Procedure it is *prima facie* barred, because a period of twelve years has run, it is saved by the order of the 31st January, 1920, by which the receiver was ordered to make half-yearly payments to the appellants, on the ground that that order is within the meaning of S. 48 (1) (*b*) a subsequent order directing payment of money.

The section is as follows:—

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from: (*a*) the date of the decree sought to be executed, or (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

Their Lordships are of opinion that on the true construction of the section the subsequent order must be an order in the suit in which the decree is made, and an order which directs payment by the debtor or the surety of money in respect of the judgment-debt. The order of the 31st January, 1920, satisfies none of these conditions. It is an order made at a time when some of the property which was believed to be the property of the debtors was the subject of some suit in the nature of an administration suit, in which a receiver had been appointed. The application for the order made in that suit was made in the absence of the judgment-debtors and in the absence of the surety, and the order for payment was an order on the receiver in that suit. That, in their Lordships' opinion, is not such an order as is contemplated by S. 48 (1) (*b*) at all, and that point, therefore, fails.

The second point depends upon S. 15 of the Indian Limitation Act, 1908, which is in these terms:—

"(1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

The point made by the appellants is this. They say that on the 16th September, 1922, the Judge in the Raj suit ordered, according to the note in the Order paper—their Lordships have

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not the order before them—that the decree-holders were to wait for some time for payment. That order was set aside on the 16th April, 1923. Therefore, there was an interval of seven months during which the order of the 16th September, 1922, was in operation. The appellants say that was a stay, and those seven months saved the situation for them, because if those seven months are not counted the present application was in time.

Now the first thing to be observed is that at the time when that order was made, there was in fact no application for execution pending at all. It was an order, again, made in the Raj suit and not in the rent suits; it was an order made on an application by the decree-holders seeking leave to proceed against property in the hands of the receiver, in the Raj suit. It was an order which did not stay execution at all, but simply said that so far as that application in that suit was concerned the appellants were to wait. That seems to their Lordships not to be in any sense within the meaning of the section, a stay of the execution by injunction or order. This point also fails.

A number of other points were discussed in the Courts below, including the relation between S. 48 of the Code of Civil Procedure and S. 15 of the Indian Limitation Act, 1908; also the relation between S. 48 of the Code of Civil Procedure and Art. 182 of the Limitation Act. Having regard to the view which their Lordships take of the two points that have been raised, those matters do not fall to be considered at all. The result must be that their Lordships will humbly advise His Majesty that this appeal should be dismissed and the appellants must pay the costs.

Solicitors for appellants: *Barrow, Rogers and Nevill.*

Solicitor for respondent: *H. S. L. Polak.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE BARDSWELL.

Venkatesha Kamthi .. *Petitioner** (*1st Respondent*)

v.

Vitla Bhakta and another .. *Respondents* (*Petitioner and Respondent*).

Venkatesha Kamthi v. Vitla Bhakta.

Civil Procedure Code (V of 1908), O. 21, R. 90—Order of attachment before judgment followed by decree—Sale held at instance of another decree-holder—Right of attaching decree-holder to apply to set aside.

A person who obtains an order of attachment before judgment and afterwards gets a decree, is a "person whose interests are affected by the sale" within the meaning of O. 21, R. 90, Civil Procedure Code, and can apply to set aside a sale held at the instance of another decree-holder.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of South Kanara in Civil Miscellaneous Appeal No. 17 of 1927 (C.M.A. No. 41 of 1927, District Court of South Kanara) preferred against the order of the Court of the District Munsif of Kasargod in R. E. A. No. 43 of 1927 in R. E. P. No. 1004 of 1926.

K. Y. Adiga for petitioner.

K. P. Sarvothama Rao for respondents.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—The only point for consideration here is whether a decree-holder who had before decree attached the judgment-debtor's property or some of it comes within O. 21, R. 90, Civil Procedure Code. It is conceded that the decree-holder was not the decree-holder in the suit in which the property was brought to sale nor was he a person entitled to share in a rateable distribution of the assets because he had not put in an execution application. But the question is whether he is a person whose interests are affected by the sale. If his interests are affected by the sale, he may apply to the Court to set aside the sale. That is what the 1st respondent did in this case. He got an attachment before judgment and subsequently got a decree in his favour. The passing of the decree confirmed his attachment. At the time when he made the application under O. 21, R. 90, Civil Procedure Code, the property had been attached and he had a decree in his favour. The property was brought to sale by a decree-holder in another

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* C. R. P. No. 62 of 1929. 17th February, 1933.

Venkatesha Kamthi v. Vitla Bhakta.

Beasley, C.J.

suit and sold and then the application was made to set aside the sale. Both the District Munsif and the Lower Appellate Court held that the 1st respondent came within O. 21, R. 90, Civil Procedure Code, and on the merits set aside the sale for the reasons given in their judgments. It is conceded here that a person "whose interests are affected by the sale" can be a person whose pecuniary interests are affected by the sale and that those words do not mean proprietary interests only. That having been conceded, what we have to consider here is whether a person who obtains an attachment before judgment and who afterwards gets a decree is a person who has a pecuniary interest. In my opinion, he clearly is. It has been held in a number of cases that a decree-holder who attaches in execution is a person who has a pecuniary interest and is a person who is within O. 21, R. 90, Civil Procedure Code. I cannot myself see that a person who has got an attachment before judgment and who subsequently gets a decree is in any different position from a person who has attached in execution. If there is any difference at all, it lies in the fact that the person who has attached the property in execution has taken a step in execution which the other person has not taken; but in both cases, the property is already under attachment for the purpose of satisfying the decree. I am clearly of the opinion that such a person as that is a person whose interests are affected by the sale. That being so, this petition is dismissed with costs.

Bardswell, J.

Bardswell, J.—I agree.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Bappu *alias* M. P. Kader Batcha Sahib .. *Appellant** (*3rd Defendant*)

v.

Dhurvas M. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons through partners and others .. *Respondents* (*Plaintiffs 1 to 3, Defts. 1, 2, 4 and 6 to 17*).

Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons.

Mortgage—Recitals—Compound interest in default of payment of interest—Default in payment of principal and interest on expiry of term

*Appeal No. 10 of 1927. 23rd January, 1933.

fixed for mortgage—Cause of action mentioned in plaint as arising on both dates—Computation of time for purposes of limitation from which date—Transfer of Property Act (IV of 1882), S. 101—Subrogation—Purchase of property subject to two mortgages—Purchaser undertaking to discharge both mortgages from out of consideration for the purchase—Earlier mortgage alone discharged—Suit by later mortgagee—Priority in respect of earlier mortgage—Purchaser if entitled to be subrogated.

Bappu *v.* Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons.

Where a mortgagee brought a suit for the sale of his mortgage, the terms of which recited that the principal amount was payable within two years, while the interest was payable at the end of each month and in case of default in the payment of interest, compound interest at a much higher rate and also the principal and interest would become payable, and default was made in the payment of even of the first instalment of interest and cause of action was said to have arisen for this suit on 22nd June, 1914, the date of default in payment of interest and also on 22nd May, 1916, the date of default in the payment of principal and interest and the suit as exactly filed was on 17th August, 1926, more than 12 years from the date of default in payment of interest, namely, 22nd June, 1914,

Held, that in a case like this, the period of limitation for the suit should be computed only from the date of the expiry of the term of the mortgage and the clause empowering the mortgagee to sue on default must be deemed to have been inserted exclusively for the benefit of the mortgagee, and as such, it gave him an option to enforce the security at once or to stand by his instrument for the full term of the mortgage. The mere fact that in the plaint compound interest was calculated even from the date of the first default in payment of interest did not necessarily indicate that the option given to him of suing within the period of limitation calculated from the expiry of the term fixed for the payment of principal had been waived. Hence suit was not barred by limitation.

Lasa Din v. *Musammat Gulab Kunwar*, (1932) I. L. R. 7 Luck. 442: 63 M. L. J. 187 (P. C.), followed.

Where the purchaser of a property was directed by the sale deed to discharge two mortgages and he discharged only one of them, the earlier, but failed to discharge the later mortgage, whereupon the later mortgagee filed a suit for sale of his mortgage in which the purchaser pleaded priority in respect of the earlier mortgage discharged by him,

Held, that the purchaser was entitled to be subrogated to the position of the first mortgagee by reason of his payment in discharge of that mortgage.

Peria Thiruvadi Aiyangar v. *Pokutti Janaki*, (1923) 45 M. L. J. 693, distinguished.

Ayyareddi v. *Gopalakrishnayya* (1923) L. R. 51 I. A. 140: I. L. R. 47 Mad. 190: 46 M. L. J. 164 (P. C.), referred to.

[NOTE.—*Lakshmi Achi* v. *Narayanasami Naiker*, (1929) I. L. R. 53 Mad. 188: 57 M. L. J. 746, not cited.]

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 81 of 1925.

Watrap S. Subrahmania Aiyar for appellant.

T. S. Venkatesa Aiyar for respondents.

The judgment of the Court was delivered by

Sundaram Chetty, J.

Sundaram Chetty, J.—The 3rd defendant has preferred this appeal against the mortgage decree passed by the

Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons.

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Subordinate Judge of Madura in a suit brought by plaintiffs 1 to 3 (now respondents 1 to 3). These plaintiffs are members of an undivided Hindu family carrying on money-lending business under the name and style of Dhurvas M. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons. Their ancestors were carrying on the same business which is continued by the plaintiff's guardians in the same way. The suit was originally instituted in the name of that firm as represented by the present 1st plaintiff as one of its partners. Objection was taken by the 3rd defendant on the ground that the suit was not maintainable in the name of the firm, but it should have been filed by all the three plaintiffs in whose favour the assignment of the suit mortgage was effected under Ex. B. Later on, the present plaintiffs 2 and 3 were added as supplemental plaintiffs on 17th August, 1926. It was contended by the 3rd defendant in the Lower Court that the suit as framed originally was not maintainable and that after the addition of plaintiffs 2 and 3 the suit should be deemed to be barred by limitation. The learned Subordinate Judge found that the suit as framed at first is maintainable, and therefore it was not necessary for him to consider at length the other question whether the suit is barred by limitation or not after the addition of plaintiffs 2 and 3. In our opinion, much of this controversy would be obviated, if regard be had to the terms of the suit mortgage deed, Ex. A, and the question of limitation be considered in the light of the recent decision of the Privy Council reported in *Lasa Din* v. *Musammat Gulab Kunwar*[1]. The terms of Ex. A are exactly similar to the terms of the bond which was the subject of consideration in their Lordships' judgment. In the present case, Ex. A recites that the principal amount is payable within two years, while the interest is payable at the end of each month and in case of default in the payment of interest, compound interest at a much higher rate and also the principal and interest will become payable. As stated in the plaint, default was made in the payment of even the first instalment of interest. Cause of action is said to have arisen for this suit on 22nd June, 1914, the date of default in payment of interest and also on 22nd May, 1916, the date of default in the payment of principal and interest. The argument advanced on behalf of the

1. (1932) I. L. R 7 Luck. 442: 63 M. L. J. 187 (P. C.).

Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons.

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appellant is, that the suit should have been filed within 12 years from the date of the first default, namely, 22nd June, 1914. If this position is correct, then the suit should have been filed within 12 years from that date. In that case, if the addition of plaintiffs 2 and 3 was also necessary, the suit must be deemed to have been filed by all the plaintiffs on 17th August, 1926. That would be more than 12 years from the date of the cause of action, namely, 22nd June, 1914. But the principle of the decision referred to above is clear on this point, and in a case like this, the period of limitation for the suit should be computed only from the date of the expiry of the term of the mortgage and the clause empowering the mortgagee to sue on default must be deemed to have been inserted exclusively for the benefit of the mortgagee, and as such, it gives him an option to enforce the security at once or to stand by his investment for the full term of the mortgage. The mortgagee has thus the option to sue within the period of limitation allowed by law computing it either from 22nd June, 1914 or from 22nd May, 1916. The question for consideration is, whether he has unequivocally elected to sue on the basis of the first default in the payment of interest and therefore precluded himself from computing the period of limitation from the latter date, namely, 22nd May, 1916. We find in paragraph 9 of the plaint that both these dates are given as the dates on which the cause of action arose. The mere fact that in the plaint compound interest is calculated even from the date of the first default in payment of interest does not necessarily indicate that the option given to him of suing within the period of limitation calculated from the expiry of the term fixed for the payment of principal has been waived. In case of default in the payment of interest, he had two courses open to him. The first is to claim compound interest and the second is to wait and sue on the basis of the default in payment of the principal, within 12 years from that date. The conflict of decisions on this question has been set at rest by the decision of the Board and that is a clear authority against the contention that the suit must be deemed to have been barred on 17th August, 1926, when plaintiffs 2 and 3 were added as supplemental plaintiffs. That being so, it is unnecessary to consider the other question, whether the suit as originally framed is maintainable or not. We therefore do not propose to deal with that question, as it is clear that even in the amended form the suit is not barred by limitation.

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* * * *

There remains another contention raised on behalf of the appellant, and that is, that by reason of Packiri Rowthen* having discharged a mortgage prior to the suit mortgage as undertaken at the time of the sale under Ex. VII, the 3rd defendant must be given priority, by being subrogated to the position of the earlier mortgagee to the extent of the sum paid by him together with subsequent interest. He has proved the discharge of the prior mortgage debt by proving the endorsement on the mortgage bond, Ex. VI. This payment was made on 13th June, 1916. There is no doubt that it is a prior mortgage. What the learned Subordinate Judge has stated is, that the 3rd defendant would not be entitled to priority by reason of this discharge, inasmuch as Packiri Rowthen had undertaken to discharge this mortgage as well as the suit mortgage under the contract entered into with the mortgagor. Reliance was placed on the decision in *Peria Thiruvadi Aiyangar* v. *Pokutti Janaki*[1]. We are of opinion that that decision rested upon the particular circumstances of that case. The mortgagor with whom that contract was made and who was also a party to the suit asked the Court to enforce that covenant and direct the purchaser to pay the amount of the later mortgage of the plaintiff, without claiming a prior lien. In this case, there was no such requisition made by the mortgagor. On the other hand, the decision of the Privy Council in *Ayyareddi* v. *Gopalakrishnayya*[2] is clear on the point. The observation at page 196 of their Lordships is that in cases like this it is to the benefit of the owner that the proceedings should be deemed to be a purchase and not a redemption and no reason appears why it should not be assumed that he intended to act in the way most beneficial to himself. Adopting this principle we have to hold that in the present case it is certainly to the benefit of the purchaser to keep alive the first mortgage which he discharged out of the purchase money. It seems to us that this principle which has had recognition in a series of decisions should be applied to the present case and there are no special circumstances which warrant a deviation from that principle. We therefore hold that the 3rd defendant

* Father of 3rd defendant.—Ed.

1. (1923) 45 M. L. J. 693.
2. (1923) L. R. 51 I. A. 140: I. L. R. 47 Mad. 190: 46 M. L. J. 164 (P. C.).

who now stands in the shoes of the purchaser is entitled to be subrogated to the position of the first mortgagee by reason of the payment of Rs. 200 in discharge of that mortgage. The contention on behalf of the appellant that this sum should be allowed to him together with subsequent interest seems to us to be untenable. Even since the purchase under Ex. VII the purchaser and his successors have been in possession and enjoyment of the properties covered by the sale deed. That being so, the claim for subsequent interest is obviously untenable. The 3rd defendant would therefore be entitled to Rs. 200 alone and nothing for subsequent interest.

One other point requires short notice. One of the items of the mortgaged properties is the right to recover a prize in a chit transaction. It appears that that right was also hypothecated under Ex. A along with two items of immovable properties. Unless it is proved that the original mortgagee (P.W. 3) actually recovered this sum, there is no force in the contention that there should be a proportionate abatement in the present claim, inasmuch as it is enforced against the other two items alone. As found by the Lower Court, there is absolutely no proof that P.W. 3 ever collected this sum That being so, the contention put forward on behalf of the appellant is without substance.

The main contentions put forward by the appellant have failed. We are informed that during the pendency of this appeal, the mortgaged properties referred to in the plaint schedule have been put up in Court auction and also purchased by the plaintiffs themselves. It is not therefore possible to provide for the payment of Rs. 200 to the 3rd defendant by directing the payment of the same out of the sale proceeds. There should be a direction now to the plaintiffs to pay this sum of Rs. 200 to the 3rd defendant which would operate as a decree in his favour.

In the result, the appeal fails in the main and the only direction we should give is that the plaintiffs should pay the aforesaid sum of Rs. 200 to the 3rd defendant with subsequent interest thereon from this date at 2½ per cent. per mensem. The appellant should pay the costs of respondents 1 to 3 in this appeal and bear his own.

K. C. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD MACMILLAN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

The Commissioner of Income-tax, Bihar and Orissa .. *Appellant**

v.

Maharajadhiraja Kameshwar Singh of Dharbhanga .. *Respondent.*

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Income-tax Act (XI of 1922), S. 10, Sub-S. (2), (i), (ix); S. 13, proviso and S. 34—Assessee's method of accounting, when may be disregarded—Receipt of interest in previous years—Open payment to account—Appropriation to interest or capital—Payment in cash or money's worth, may be taxable as income receipt—Deduction for royalty paid in working a colliery—Income-tax Act (XI of 1922), S. 66—Reference to High Court by Commissioner—Procedure in—Necessity of a formal decree by the High Court

Where the method of accounting employed by the assessee is such that the income, profits and gains cannot properly be deduced therefrom, the Income-tax Officer is empowered (under the proviso to S. 13 of the Income-tax Act, 1922) to discard the assessee's method of accounting and to adopt a method of computation of his own.

In computing the interest received by the assessee from a money-lending transaction in a particular year, the Income-tax Officer may justifiably take into account both actual receipts of interest in that year and sums carried by the assessee to income account in that year out of the receipts of previous years which have been held in suspense and no part of which has previously been returned as income.

Commissioner of Taxes v. *Melbourne Trust, Ltd.*, (1914) A. C. 1001 at 1011, relied on.

Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest, by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest: *Venkatadri Appa Row* v. *Parthasarathi Appa Row*, (1921) L. R. 48 I. A. 150 at 153: I. L. R. 44 Mad. 570: 40 M. L. J. 549 (P. C.), followed.

Held, (applying the above presumption), that where the assessee in the relevant year of computation received a lump sum from his judgment-debtor, but had not, at the date when he received payment, either in his own books or in relation to the revenue authorities, as yet attributed any sum towards the debtor's liability in interest, the Income-tax Officer was entitled to treat this lump sum as applicable to the outstanding interest and taxable as such, and the assessee could not contend that it should be treated in the first place as a payment against the capital liability of the debtor.

In the year of computation, one *G. S.*, who owed the assessee 32 lakhs as principal and 6 lakhs as interest (38 lakhs in all) on an unsecured loan, made over to the assessee various items of property, including promissory notes of

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*P. C. Appeal No. 75 of 1931. 24th January, 1933.

Patna Appeals Nos. 3 of 1930 and 7 of 1931.

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third parties (Rs. 20 lakhs), and promissory notes of the debtor *G. S.* himself (for Rs. 18 lakhs), of the total value of Rs. 38 lakhs, in satisfaction of his indebtedness.

Held, that the 6 lakhs due as interest by the debtor *G. S.* could not be assessed as interest deemed to have been received by the assessee. (1) So far as the debtor's own promissory notes of 18 lakhs were concerned, the assessee did not receive any payment at all. (2) As regards the other items of 20 lakhs, assuming that they could be regarded as a payment in kind and as equivalent of cash, or money's worth, it was competent for the assessee to appropriate the 20 lakhs to capital account, *i.e.*, in discharge *pro tanto* of his debtor's capital liability.

Californian Copper Syndicate v. *Harris*, (1904) 6 F. 894: 5 Tax Cases 159; *Scottish and Canadian General Investment Company* v. *Easson*, (1922) S. C. 242: 8 Tax Cases 265; *Cory Brothers & Co.* v. *Owners of the "Mecca"*, (1897) A.C. 286; *Smith* v *Law Guarantee and Trust Society, Ltd.*, (1904) 2 Ch 569 and the Indian Contract Act (IX of 1872), Ss. 60 and 61, referred to.

The assessee, who was carrying on the business of a colliery owner, claimed to deduct from the assessment arrears of royalty paid by him to the superior landlord.

Held, negativing the claim, that the sum so paid by him was neither "rent" nor an expenditure incurred by him solely for the purpose of earning the profits or gains of the colliery business within the meaning of S. 10, Sub-S. (2), (*i*) or (*ix*).

Under S. 34 of the Act, the Income-tax Officer cannot re-open any assessment after the expiry of one year from the end of the year of original assessment.

Under S. 66 it is for the Commissioner of Income-tax to state formally the questions of law which arise, and under Sub-S (5) it is the duty of the High Court to decide the questions of law so raised. Where the Commissioner omitted to formulate any question of law, and the High Court itself formulated the question to be decided, and gave its decision thereon, the Privy Council deprecated this departure from regular procedure.

The questions of law which the Commissioner refers to the High Court under S. 66 should, for facility of reference, be numbered consecutively at the end of the stated case

In disposing of a reference on questions of law under S. 66, the High Court should prepare a formal decree following upon its judgment, and the decree should give the necessary directions as to the costs in the case.

Judgment of the High Court, Patna, (I. L. R. 9 Pat. 240), varied.

Consolidated appeals No. 75 of 1931 from an order of the High Court, Patna, dated the 25th November, 1929, on a reference by the Commissioner of Income-tax, Bihar and Orissa, under S. 66 of the Indian Income-tax Act, 1922.

The facts of the case are fully stated in the Board's judgment and in the judgments of the High Court, Patna, reported in I. L. R. 9 Pat. 240.

The authorities cited during the course of the arguments are set out in their Lordships' judgment. The following cases were also referred to:—*Bernhard* v. *Gahan*[1], *Inland Revenue* v. *Newcastle Breweries*[2], *John Smith* v. *Moore*[3]. *London County Council*

1. 13 Tax Cases 723.
2. 12 Tax Cases 927. 3. (1921) 2 A. C. 13.

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v. *Attorney-General*[1], *Coltness Iron Co.* v. *Black*[2], *Parr's Banking Co.* v. *Yates*[3], In re *Roundwood Colliery* v. *Lee*[4], *Royal Insurance Co.* v. *Watson*[5] and *Smith* v. *Law Guarantee and Trust Society, Ltd.*[6]

A. M. Latter, K.C., W. Wallach and *H. W. Williams* for assessee.

Dunne, K.C. and *Reginald Hills* for Commissioner of Income-tax.

24th January, 1933. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—Their Lordships have to dispose of two consolidated appeals from a judgment of the High Court of Judicature at Patna, dated the 25th November, 1929, dealing with certain questions referred to the Court by the Commissioner of Income-tax, Bihar and Orissa, under S. 66 of the Indian Income-tax Act, 1922. The questions all relate to the assessment for tax purposes of the income for the year 1926—27 of the Maharajadhiraj of Darbhanga, who died on the 3rd July, 1929, and is now represented in these proceedings by his eldest son. As regards two of the questions, the Commissioner of Income-tax is appellant; as regards the rest the assessee is appellant.

By S. 3 of the Act of 1922, income-tax is chargeable in India "in respect of all income, profits and gains of the previous year". The assessee's practice was to make up his accounts for the Fasli year which ends on 30th September and consequently, under S. 2 (11) (*a*) of the Act, the "previous year" in the present case is the Fasli year 1332, which ended on 30th September, 1925. The taxable income of the assessee for the year 1926—27 thus consists of his income, profits and gains for the year ending 30th September, 1925, as computed in accordance with the provisions of the Act.

The Assistant Commissioner of Income-tax, acting as Income-tax Officer, having made an assessment of the assessee's taxable income for the year in question, the assessee appealed to the Commissioner of Income-tax, Bihar and Orissa, acting as Assistant Commissioner, who made an order reducing the assess-

1. (1901) A. C. 26.
2. (1881) 6 A. C. 315 at 335.
3. (1898) 2 Q. B. 460 at 466.
4. ((1897)) 1 Ch. 373 at 389.
5. (1897) A. C 1 at 6.
6. (1904) 1 Ch. 500, *o.a.*, (1904) 2 Ch. 569.

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ment in respect of three particular items but otherwise affirming it. The assessee then required the Commissioner under S. 66 (2) to refer to the High Court certain questions, purporting to be questions of law arising out of his order. The Commissioner, as required by the Act, drew up a statement of the case and referred it with his own opinion thereon to the High Court. It is against the answers rendered by the High Court to certain of the questions formulated in the case so stated that the present appeals have been taken.

With one exception, the points which were debated before their Lordships relate to money-lending transactions of the assessee. As the assessee was held not to be carrying on the business of money-lending he was assessed in respect of these transactions, not under S. 10 which provides for the computation of the "profits or gains" of a business, but under S. 12, which provides for the computation of "income, profits and gains" from other sources. In the one exception, which relates to the carrying on of a colliery taken over by the assessee from a debtor, the assessment was under S. 10.

As the questions which have arisen are in large measure due to the assessee's method or want of method in recording his money-lending transactions, it will be convenient to give a description of his practice in the matter as furnished in the case stated by the Commissioner. The assessee, it appears, kept "a deposit register in which payments made by debtors are ordinarily first of all recorded but without any allocation between principal and interest. Subsequently, if and when allocation is made, an entry in respect of the interest portion of these payments is made in the interest ledger as well as in the interest account of the general ledger. This allocation is not necessarily made in the year in which the money has actually been paid to the assessee. It may be made in the following year, or, indeed, several years later."

Prior to the year 1331 Fasli the assessee produced to the income-tax authorities only his interest ledger and did not disclose his deposit register. In these previous years he claimed to be and was assessed in each year on the total of the sums credited as interest in the preceding year in his interest register. Owing to the system on which the interest register was kept, it is obvious that the assessee was in each year assessed not on the total of the sums actually received by him as interest during

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the preceding year, but on such sums as the assessee had chosen during that preceding year to allocate to interest and carry to his interest register out of payments received by him in that and former years. In computing the income of the assessee for the year 1331 Fasli the assessing officer had for the first time available to him the assessee's deposit register. On this occasion the officer made his computation by taking first all the sums allocated to interest and entered in the interest register for that year, irrespective of the years in which these sums had actually been received by the assessee; he then resorted to the deposit register, noted the sums there shown as actually received in that year by the assessee but from which no allocations to interest had been carried to the interest register, made his own calculation of the proportions of interest comprised in such sums and added the result to the sum of the entries in the interest register for that year.

In computing the income of the assessee for the next year, *viz.*, 1332 Fasli, being the income of the year of account with which their Lordships are concerned in this appeal, the assessing officer again took first the amount shown as credited in that year in the interest register, but on this occasion, less the sums which he had in the previous year taken into account from the deposit register and which now appeared in the interest register; he next examined the deposit register and in the case of sums there shown as received in 1332 Fasli but from which the assessee had made no allocation to interest account he himself calculated the proportion of each receipt which represented interest and added the result to the figure obtained, under the deduction stated, from the interest register.

The Commissioner states as follows the general question which in these circumstances arises for decision:—

1. "Assessees' method of accounting in respect of receipts from interest on loans being as described above was the assessing officer's action in calculating the profits and gains of the previous year as he has done warranted by law?"

The Commissioner has not attached numbers to the various questions and their Lordships have found it convenient to number those which they have had to consider in the order in which they have dealt with them.

The authority empowering the Income-tax Officer to discard the assessee's method of accounting and to adopt a method of

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his own is to be found in S. 13 of the statute which after enacting in general terms that income, profits and gains shall be computed in accordance with the method of accounting regularly employed by the assessee, goes on to provide *inter alia* that "if the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."

There can be no question that in the circumstances, the Income-tax Officer was entitled to disregard the assessee's method of accounting and adopt a method of computation of his own. But the fact that the Income-tax Officer has justifiably proceeded on a basis and in a manner of his own in computing the assessee's income, profits and gains does not, of course, exempt his computation from examination on appeal and if it appears that he has adopted a wrong method the assessment may be set aside. Their Lordships have therefore to consider whether the Commissioner and the learned Judges of the High Court were right in answering in the affirmative, as they did, the question above posed.

Now it will be observed at once that the method adopted by the Income-tax Officer has the result of bringing out a sum composed in part of actual interest receipts of the assessee in the year of computation and in part of sums received in previous years and allocated by the assessee to interest in that year. The question is whether this method or combination of methods was legitimate. That it was legitimate to ascertain in the first place the actual receipts of interest in the year of computation is undoubted. Was it legitimate to add the items which the assessee in the year of computation carried to interest account out of sums received in previous years? Was the Officer entitled to treat these allocations as income of the year of computation?

Where an assessee keeps his books on a cash basis disclosed to the revenue authorities and the Officer accepts that basis, it is clear that the calculation must be based on actual receipts in the year of computation. Here, however, the assessee kept his books on a hybrid system and it was his practice to enter sums as he received them in a deposit register

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not made available to the revenue authorities, without discriminating between interest and capital payments, and then subsequently to allocate and treat as income certain portions of these sums which he attributed to interest. What the Officer is directed to compute is not the assessee's receipts but the assessee's income and *in dubio* what the assessee himself chooses to treat as income may well be taken to be income and to arise when he so chooses to treat it. (See *per* Lord Dunedin in delivering the judgment of the Board in *Commissioner of Taxes* v. *Melbourne Trust, Ltd.*[1]) The sums which the Officer has brought into account from the interest register in so far as consisting of allocations from sums received in previous years have never borne tax and in their Lordships' opinion the assessee cannot complain if the Officer agrees with the assessee in treating them as income of the year in which the assessee himself first thought fit so to regard them. Their Lordships see nothing contrary to principle in the computation of an assessee's total income for a particular year as consisting in part of actual receipts in that year and in part of sums carried by the assessee to income account in that year out of the receipts of previous years which have been held in suspense and no part of which has previously been returned as income. Their Lordships do not find that the Income-tax Officer in the present case has acted in any way illegally in computing the profits of the transactions in question for the year 1332 Fasli by taking into account both actual receipts of interest in that year and sums treated by the assessee in that year as receipts of interest by their transference to the interest register from what for this purpose may be regarded as a suspense account.

Their Lordships accordingly in the result find themselves in agreement with the affirmative answer rendered below to this question.

Their Lordships now pass to the consideration of two particular transactions as to which questions have arisen.

It appears that the assessee in respect of two mortgage decrees which he held against one Damodar Das Burman received payment in the relevant year of two sums of Rs. 3,400 and Rs. 2,78,000. The assessee appropriated the whole of the first of these sums to interest and no question arises with

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1. (1914) A. C. 1001 at 1011.

regard to it. As regards the second sum he appropriated only Rs. 18,816 to interest and claimed to attribute the balance towards the discharge of capital. The Income-tax Officer brought the whole sum of Rs. 2,78,000 into computation as an interest receipt and the Commissioner and the High Court have agreed with him. The question as framed by the Commissioner is as follows:—

2. "In the circumstances of this case, what portion of the amount received from Damodar Das Burman in the previous year is legally taxable?"

The facts as stated by the Commissioner are that the total amount of interest irrespective of whether it was paid or not, which had, as a matter of calculation, accrued on the debt from the date of its commencement down to the date of the payment of Rs. 2,78,000 to the assessee in the year 1332 Fasli was Rs. 3,09,281. During the currency of the debt the debtor made regular payments over a number of years to the assessee, the total of which payments is not stated. These payments were entered in the deposit register but no allocations thereof were made as between principal and interest and no part of these payments was carried to the interest register. Consequently, no part of these payments was subjected to tax until the year Fasli 1331, when the deposit register became available to the Income-tax Officer. In that year the deposit register showed the receipt of Rs. 38,091 and on this the Officer claimed and was paid tax on the footing that it was attributable to interest and not to principal. The result is that against the total interest on the debt, *viz.*, Rs. 3,09,281 no sums had been attributed by the assessee to interest out of the payments made to him by the debtor down to the date of the receipt by him from the debtor of the sum of Rs. 2,78,000 in the year Fasli 1332, but that the Income-tax Officer had himself treated the sum of Rs. 38,091 received in the year Fasli 1331 as interest and taxed it accordingly. That leaves Rs. 2,71,190 as the balance of the total interest on the debt during its currency towards which balance the assessee made no attributions of interest out of the payments received by him from the debtor during its currency. No tax has accordingly been paid in respect of any of these receipts other than the Rs. 38,091 which the Officer treated as an interest payment in the year 1331 Fasli. How in those circumstances should the receipt of Rs. 2,78,000 in the year 1332 Fasli be treated? The assessee contends that the whole of this sum,

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other than a sum of Rs. 18,816 which he admits may be treated as a payment of interest, should be treated as a payment against the capital liability of the debtor. But at the date when the assessee received payment of the Rs. 2,78,000 he had not either in his own books or in relation to the tax collector as yet attributed any sum towards the debtor's liability in interest, apart from the sum of Rs. 38,091 which the Officer in the previous year had treated as interest. So far as the assessee's interest register showed he had not treated himself as having received any interest and so far as that book, which he put forward to the revenue authorities as showing the interest which he had received is concerned, there was still outstanding the whole sum of Rs. 3,09,281 of interest, as against which must, of course, be set the sum of Rs. 38,091 taxed as interest in the preceding year. In disposing of the first question dealt with above their Lordships have held that the assessee cannot complain if sums which he himself in a particular year treats in his interest register as interest received in that year are also treated by the revenue authorities as income of that year although such sums were in fact received in previous years. Similarly and conversely, their Lordships are of opinion that the assessee cannot complain if he is treated as not having received any payment of interest in years in which he made no appropriations to interest out of sums received by him in these years and neither disclosed such receipts to the revenue authorities nor made any return of any part of them as income. Their Lordships therefore approach the question of how the sum of Rs. 2,78,000 actually received in the year Fasli 1332 is to be dealt with on the footing that up to then no interest had been treated as paid out of the total of Rs. 3,09,281 due other than the sum of Rs. 38,091. Now where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest, by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest (*Venkatadri Appa Row* v. *Parthasarathi Appa Row*[1]). This presumption is no doubt operative primarily in questions between debtor and creditor, but in their Lordships' view, the Income-tax Officer,

1. (1921) L. R. 48 I. A. 150 at 153: I. L. R. 44 Mad. 570: 40 M. L. J. 549 (P.C.).

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finding that the assessee received a payment from his debtor of Rs. 2,78,000 in the year Fasli 1332 and that the assessee had not up till then credited himself as having received any interest or disclosed or accounted for any interest receipts to the revenue authorities, was entitled in the circumstances to treat this sum of Rs. 2,78,000 as applicable to the outstanding interest to the extent of Rs. 2,71,190, and accordingly to treat the payment to that extent as income of the assessee in the year of payment. It will be noted that the result of this is that the assessee will be able to treat all the unallocated payments received by him in the years before 1331 Fasli as payments towards capital and none of these prior payments will have borne or can be called upon to bear tax. Under S. 34 of the Act, the Income-tax Officer cannot re-open any assessment after the expiry of one year from the end of the year of original assessment.

Their Lordships therefore agree with the learned Judges of the High Court that the answer to this question is in figures Rs. 2,71,190.

The next question relates to the interest on the debt of one Amarnath Bose, against whom the assessee held a judgment. The debtor in the year 1332 Fasli made a payment to the assessee of Rs. 1,38,955. In his interest register for that year he appropriated and entered Rs. 20,000 out of this sum as interest, but he also entered in his interest ledger for that year a sum of Rs. 1,40,107 being appropriations then first made to interest out of sums received from the debtor in previous years, which, of course, had not borne any tax. The appropriations to interest by the assessee in his interest register for the year in question consequently amounted to Rs. 20,000 + Rs 1,140,107 = Rs. 1,160,107. But of the Rs. 1,40,107 then first appropriated to interest by the assessee Rs. 80,000 was actually received by him in the year 1331 Fasli and was in that year subjected to tax by the revenue authorities, so that the balance of Rs. 60,107 represented appropriations to interest by the assessee out of sums received in years before 1331. This sum had never before been appropriated by the assessee to interest or treated by him as income in a question with the revenue and, following the principle already laid down by them, their Lordships are of opinion that it was properly regarded by the taxing officer as income of the assessee in the year in which he appropriated it to income.

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The question on this topic which was stated by the Commissioner is thus expressed:

3. "What is the amount of profits and gains arising out of the payments made by this judgment-debtor legally taxable in this year?"

Their Lordships agree with the High Court in answering that out of the appropriations to interest in the year of computation the total amount taxable is Rs. 60,107, over and above the proportion representing interest of the payment of Rs. 1,38,955 actually received in the year 1332, such proportion being admitted to be Rs. 1,23,906, so that the total sum chargeable with tax is Rs. 1,23,906 + Rs. 60,107=Rs. 1,84,013.

Passing to the further questions raised in the case and omitting a transaction relating to a loan to a Colonel Lewellyn as to which the assessee has acquiesced in the decision of the High Court, their Lordships have next to consider the estimate made by the Income-tax Officer of the income received by the assessee in the year of computation from the purchase of properties under mortgage decrees. The general question which was raised below on behalf of the assessee was not argued before their Lordships, namely, whether when a mortgagee purchases at auction under a decree of the Court the property which was the subject of the mortgage he can be said to have received to any extent the equivalent of the interest due on his mortgage. This question had been decided in the affirmative in a recent case of *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax*[1], which their Lordships heard on appeal immediately after the present case and in which they are to-day delivering an affirmative judgment on this point, to which reference may be made.* The assessee in the present case admitted the receipt of income in the year in question from this source to the extent of Rs. 4,364. This sum the Income-tax Officer increased to Rs. 1,04,364 and the question stated by the Commissioner is:

4. "Whether the assessing officer was right in making an estimate of Rs. 1,04,364 under this head as he has done?"

The Commissioner states that the assessee "keeps a suit register in which the progress of each case is supposed to be

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1. (1929) I. L. R. 9 Pat. 48.

*See Privy Council Appeal No. 18 of 1931, *Raja Raghunandan Prasad Singh* v. *The Commissioner of Income-tax*, (1933) 64 M. L. J. 544.—K.J.R.

noted but no attempt is made to keep this register up to date and in fact the sum of Rs. 4,364 referred to above is shown neither in this register nor in the interest account. On referring to the history of assessments made in previous years I find that in the assessment made in the year 1924-25 while the assessee showed no income under this head the assessing officer estimated the income to be Rs. 6,00,000. This sum was reduced on appeal to two lakhs and the order on appeal was maintained by the then Commissioner. In the assessment made in the year 1925-26 for similar reasons the assessing officer added back a sum of Rs. 3,00,000 without objection by the assessee. In that year assessee showed no income from this source in the return, but admitted in the course of assessment proceedings a receipt of Rs. 20,069 to which the assessing officer added back as stated above a sum of Rs. 3,00,000 without exception on the part of the assessee. Similarly in the year 1926-27 (the assessment with which we are now dealing) the assessee showed no income from this source in the statement filed with his return of income, but subsequently admitted realisation of Rs. 4,364 only." In the High Court the Chief Justice (Courtney Terrell) after pointing out that the question is one of quantum only, says:

"Learned counsel for the assessee has argued that the officer is not entitled to make a guess without evidence and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made. I would answer the question in the affirmative."

The other Judges concurred and their Lordships also agree, adding only that if the assessee wished to displace the taxing officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do.

Their Lordships next turn to the consideration of a transaction between the assessee and one Kumar Ganesh Singh. In the year 1332 Fasli Kumar Ganesh Singh owed the assessee 32 lakhs as principal and Rs. 6,09,571 as interest, or a total of Rs. 38,09,571 in all, in respect of an unsecured loan. In that year the assessee and his debtor entered into an arrangement whereby, as the Commissioner states, "the assessee took over

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from the debtor in satisfaction of this amount the following items of property movable or immovable:—

		Rs.
(1) The Kajora Colliery, valued at	..	7,37,339
(2) Shares in different companies, valued at	..	94,125
(3) Bills receivable by the above brokers [*i.e.*, Ganesh Singh's firm]	..	48,809
(4) Decree	..	1,42,594
(5) Transfer of loan to the Agra United Company	..	10,00,000
(6) Pro-notes and hand-notes [of third parties]	..	52,106
(7) Hand-notes from Kumar Ganesh Singh	..	17,34,596
	Rs.	38,09,569"

The Commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court under S. 66 (5) is to "decide the questions of law raised" by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being—

5. "Whether the interest (*i.e.*, the sum of Rs. 6,09,571 due as interest by the debtor) can be considered to have been received and assessable?"

Their Lordships deprecate this departure from regular procedure, but in the circumstances have not thought it proper to decline to express their view on the question thus informally presented.

The Commissioner's opinion was that the transaction when rightly viewed amounted to the acceptance by the assessee from his debtor, in lieu and satisfaction of the capital and interest due to him, of assets and securities *prima facie* worth the valuation put upon them and that as the assessee had thus received payment in kind of the interest due to him in full, he should be assessed accordingly. There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and that a receipt in kind may be taxable income. But for this to be so it is essential that what is received in kind should be the equivalent of cash or, in other words, should be money's worth (*Californian Copper Syndicate* v. *Harris*[1], *Scottish and Canadian General Investment Company* v. *Easson*[2], both cited by Das, J., below). Now here the first six items, amounting to Rs. 20,74,973, may perhaps reasonably enough be

1 (1904) 6 F. 894: 5 Tax Cases 159.
2. (1922) S. C. 242: 8 Tax Cases 265.

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regarded as the equivalent of cash, but the seventh item of Rs. 17,34,596, consisting of the debtor's own promissory notes, was clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far then as this item of Rs. 17,34,596 is concerned the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all. In so holding their Lordships find themselves in agreement with the learned Judges of the High Court who differed on this point from the Commissioner.

This conclusion seems to have been regarded in the High Court as decisive of the whole question, but before their Lordships an argument was submitted for the Crown which does not appear to have been advanced below. Assuming that the first six items, amounting to Rs. 20,74,973, may be treated as money's worth, Counsel for the Crown contended that this sum, which far exceeded the total amount of interest due, must be treated as applicable in the first place to the discharge of the debtor's liability for interest. He relied on the presumption, already invoked in the case of Damodar Das Burman above, that a creditor is presumed to apply payments received from his debtor towards the extinction of interest claims before capital claims. But the situation which their Lordships are now considering differs materially from that which existed in the case of Damodar Das Burman. In that case, apart from other specialities, there was no settlement, but merely an open payment to account. Here there was an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance. The basis of the presumption, namely, that it is to the creditor's advantage to attribute payments to interest in the first place, leaving the interest-bearing capital outstanding, is gone. Moreover, if the question were one between Kumar Ganesh Singh and the assessee, *i. e.*, between debtor and creditor, the assessee might up to the last moment appropriate the Rs. 20,74,973 to capital account (*Cory Brothers & Co.* v. *Owners of the "Mecca"*[1]) and there is authority for the proposition that in a question with the

1. (1897) A. C. 286.

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revenue the taxpayer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself (*Smith* v. *Law Guarantee and Trust Society, Ltd.*[1]). Their Lordships have also not omitted to bear in mind the provisions of Ss. 60 and 61 of the Indian Contract Act, though these were not relied on in argument as applicable to the case. In the result their Lordships are of opinion that, having regard to the nature of the transaction, the assessee is entitled to say that he has accepted the first six items in discharge *pro tanto* of his debtor's capital liability and that the capital debt now stands discharged to that extent. No part of the sum of Rs. 20,74,973 accordingly was received by the assessee as taxable income in the year of computation. The result is that the Commissioner's appeal against the answer of the High Court to the fifth question fails.

A subsidiary point arose as to the year to which this income, if it was received, ought to be attributed. The Commissioner put the question—

6. "Whether if any sum is held to have been realised, it was legally recovered in the year 1331 or in the year 1332?"

The Judges of the High Court agreeing with the Commissioner expressed the view that if there was any receipt of interest it was attributable to the year 1332. The learned Chief Justice stated that it was "conceded on both sides that the instrument of transfer was executed and dated on April 29, 1925, that is, in 1332, and that the title to the assets conveyed passed on that date. Had the amount of interest been assessable it would have been assessable in respect of 1332." Their Lordships agree, and the answer of the High Court to the question will be affirmed.

The next question is of a different character. When Kumar Ganesh Singh, who was a sub-lessee of the Kajora Colliery, transferred it to the assessee as of the value of Rs. 7,37,339 he represented it to be free from encumbrances. The assessee subsequently discovered that there were arrears of fixed or dead rent due to the superior landlord to the extent of Rs. 67,872. The assessee paid this sum to the superior landlord and now claims to deduct it from his assessment. In this instance, their Lordships are concerned with the

1. (1904) 2 Ch. 569.

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computation of the profits or losses of a business under S. 10 of the Act, for the assessee was carrying on the business of a colliery owner.

The question arising in respect of this matter is put thus by the Commissioner:

7. "Whether the assessee is legally entitled to deduct the arrears of royalty which had accrued in previous years up to the date of his possession?"

The relevant provisions of the Income-tax Act are contained in S. 10 which enacts in sub-section (2) that the profits or gains of a business shall be computed "after making the following allowances, namely:—

(*i*) any rent paid for the premises in which such business is carried on . . . .

* * * *

(*ix*) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

Sub-section (3) provides that—

"In sub-section (2) the word 'paid' means actually paid or received according to the method of accounting upon the basis of which the profits or gains are computed under this section."

The Commissioner was of opinion that the question which he had stated should be answered in the negative, on the two grounds that "admittedly" the assessee was entitled to recover from Kumar Ganesh Singh the arrears of rent for the period prior to the assessee's possession, and that royalties were not rent within the statutory meaning. The High Court answered the question in the affirmative, holding that royalties may properly be considered as rent; that it was "a condition without which further mining operations could not be effected," that payment should be made of the arrears which were "of the nature of a charge in the year 1332"; and that as the previous tenants had not paid their rent during the period in arrear they had not been able to deduct rent in their returns, and there was no reason why, when the arrears came to be paid, they should not be deducted as though they had accrued in the year in which they were paid.

In their Lordships' view the solution of the problem is to be found in a consideration of the nature of the particular transaction out of which it has arisen. The assessee agreed to accept the transfer of the colliery in part satisfaction of Kumar

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Ganesh Singh's liability to him on the footing that it was value for Rs. 7,37,399. Had he known, what was concealed from him, that arrears of unpaid rent had accumulated which he would have to pay to the superior landlord, he would have correspondingly diminished the sum at which he was prepared to take over the colliery and, according to the Commissioner, it was admitted that the assessee has a claim against Kumar Ganesh Singh for the difference, although he may not be able to recover it. If it were recovered, it would properly be credited in diminution of the figure at which the colliery was taken over and would not enter the profit and loss account of working the colliery. From this it follows that the sum overpaid by the assessee for the colliery cannot properly be described as a loss sustained by him on income account. It is a sum which was payable by him in order to get possession of the colliery, not a sum expended by him in the carrying on of the colliery. It is not rent for any period of his possession, nor is it an expenditure incurred by the assessee for the purpose of earning the profits or gains of the colliery business. If the assessee paid it without any legal liability or necessity on his part to do so, such a voluntary payment is not a permissible deduction from income. Their Lordships are therefore of opinion that in the circumstances of this transaction the question should be answered in the negative.

Their Lordships have now dealt with all the questions which were argued before them. The result is the affirmation of the decision of the High Court, except as regards Question 7 as above numbered, on which their Lordships are of opinion that the appeal of the Income-tax Commissioner should be allowed, the finding of the High Court reversed and the order of the Commissioner of the 24th May, 1927, restored.

Their Lordships desire to draw attention to the inconvenience which has arisen from the omission on the part of the Commissioner to number the questions which he has stated. It is desirable that the questions of law which the Commissioner refers to the High Court should, for convenience of reference, be assembled and numbered consecutively at the end of the stated case. Their Lordships have also been embarrassed in disposing of the appeal by the absence of a formal decree by the High Court following upon their judgment of the 25th November, 1929. Their Lordships have nothing before them to

show whether, and if so how, the costs in the case were dealt with below.

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Their Lordships will humbly advise His Majesty that in these consolidated appeals (1) the appeal of the Commissioner of Income-tax so far as relating to the seventh question as above numbered be allowed, the judgment of the High Court reversed, and the order of the Commissioner of the 24th May, 1927, restored, and as regards the other question on which he appealed be dismissed; (2) the appeal of the Maharajadhiraj of Darbhanga be dismissed; and (3) the case be referred back to the High Court in order that effect may be given to the order to be pronounced herein by His Majesty in Council.

Inasmuch as the Commissioner of Income-tax has been successful on one of the two points on which he appealed and the assessee has been unsuccessful on all the points of his appeal, the Commissioner will have three-fourths of his costs of the consolidated appeals before this Board. The costs below will be dealt with by the High Court, on the case going back to it.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Solicitor, India Office.*

K. J. R. *Appeal by the Commissioner allowed in part: Appeal by the assessee dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH AND MR. JUSTICE BARDSWELL.

Azhagappa Chetti, minor, by mother and guardian Oonnamalai Ammal .. *Appellant** (*9th Defendant*)

v.

S. A. Ramanathan Chettiar .. *Respondent* (*Plff*).

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Civil Procedure Code (V of 1908). O. 5. R. 19—Execution application—Notice ordered by Court to be served on defendant—Affixture of notice to dwelling-house owing to reported absence of defendant—Non-appearance of defendant consequently—Sufficiency of service not declared by Court as required by O. 5, R. 19 of Civil Procedure Code—Whether constructive principle of res judicata *applicable against defendant.*

When a notice of an execution application is ordered by Court to be served on the defendant and the notice has to be affixed to the door of the dwelling-house owing to the reported absence of the defendant, the Court must either declare it sufficient or order such service as it thinks fit, as it is imperatively required to do so under O. 5, R. 19 of the Civil Pro-

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*C. M. A. No. 235 of 1929. 21st October, 1932.

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cedure Code, and in a case where it is sought to apply the constructive principle of *res judicata* against the defendant, the omission of the Court to make such a declaration as enjoined by the Code is fatal.

Admittedly S. 11, Civil Procedure Code, is not applicable as it relates to matters decided in suits. It is only on principles analogous to that section that *res judicata* can be applied to execution proceedings.

Case-law reviewed.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated the 17th April, 1929, in Miscellaneous Petition No. 272 of 1927 in O. S. No. 31 of 1919.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *E. Vinayaka Rao* for appellant.

A. Swaminatha Aiyar and *R. Rajagopala Aiyangar* for respondent.

The judgment of the Court was delivered by

Pakenham Walsh, J.

Pakenham Walsh, J.—This appeal arises out of a certain execution proceeding in which the plaintiff in O. S. No. 31 of 1919 seeks to execute a part of a compromise decree passed in that case. There are two related families which for the purpose of this case we may call the S. A. and the S. N. families. These families had endowed certain charities. The plaintiff in O. S. No. 31 of 1919 belongs to the S. A. family and he brought a suit against the S. N. family for reliefs which will be detailed later. The parties compromised the suit by an agreement, reduced to writing on the 20th April, 1921. A decree in terms of the compromise was granted on the 7th September, 1921. The plaintiff put in an execution petition, Ex. A, on the 2nd March, 1925, in which he asked for the arrest of the 1st defendant and for delivery of documents as per terms of the decree. It is stated in the remarks at the end of the petition that the petition is not barred by limitation as the suit was one in respect of a scheme. The application being more than a year after the date of the decree, notice was ordered under O. 21, R. 22, Civil Procedure Code, for 27th April, 1925. This notice was ordered on the 31st March, 1925. Another E. P., M. P. R. No. 131 of 1925, was put in on 1st April, 1925, for transmission of the decree to the Court of the Subordinate Judge of Sivaganga for execution. The subsequent proceedings are not very clearly to be made out from endorsements, nor can it be made out from the two returns, Exs. B and B-1, which return related to which notice. We may gather from the order that the return, Ex. B-1, relates to the application for transmission and the return, Ex. B, relates to the application for arrest. Even

in the order there is a mistake on this point because the learned Subordinate Judge says that the endorsement that the judgment-debtor left two days previously is on Ex. B and he says that Ex. B is the return on the notice for transmission. But this is the entry on Ex. B-1 and the return on Ex. B is that the 1st defendant had gone a week ago to Madras. On Ex. A, the endorsement by the Court on the 27th April, 1925, is " Notice not returned from Ramnad. Adjourned to 8th July." The next entry is " Not yet returned. Arrest by 3rd August," and it is dated 8th July, 1925. If that entry is correct it would automatically establish the defendant-appellant's case that he was not served with that notice before the arrest order was passed. But it seems clear there is an error here because both the notices had been returned as served by that date. Ex. B is marked " District Court, South Arcot, 10th May, 1925 " and Ex. B-1 is marked " District and Sessions Court, South Arcot, Cuddalore, 11—5—1925". As it has not been contended before us that the notices were not returned to Court as served before the date of the orders, this matter need not be further mentioned, except to say that in Ex. A not only is there no order that the service is sufficient but there is not even a note that it has been served in any way and that without any such record being made, arrest by 3rd August was ordered on the 8th July, 1925. As the batta was not paid, the petition was dismissed on the 3rd August, 1925. As regards the transmission petition Ex. A-1 the orders are "Notice for 8—7—1925" dated 6—4—1925 and " Defendants 1 and 3 to 7 absent affixed. Defendants absent. Granted" on 8—7—1925. The decree was transmitted for execution but as no execution was applied for within six months it was re-transmitted. More than two years afterwards the plaintiff presented another execution petition, M. P. R. No. 272 of 1927, dated the 3rd November, 1927. The defendants pleaded that the decree was not executable. The plaintiff had also applied to add the legal representatives of the deceased 4th defendant and to transmit the decree to the Court of the Subordinate Judge of Devakotta for execution. The defendants had no objection to the adding of the legal representative or to the transmission of the decree, provided it was executable but they contended that it was not executable. The learned Subordinate Judge held that the question regarding the execut-

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ability of the decree was a matter to be decided by the Court to which it was to be transmitted. On this matter an appeal was taken to the High Court and in their order, dated the 4th April, 1928, Madhavan Nair and Jackson, JJ., held that this was a matter to be decided by the Sub-Court which transfers the decree. The Subordinate Judge then decided that *per se* the decree was not executable, but that the defendants were barred on the principle of *res judicata* from raising this contention on account of the execution proceedings taken out in 1925. Against this order the present appeal is preferred.

[Their Lordships first dealt with the question of the executability of the decree on the facts before them, apart from the question of *res judicata.*]

We will now turn to the question of *res judicata*. Admittedly S. 11, Civil Procedure Code, is not applicable as it relates to matters decided in suits. It is only on principles analogous to that section that *res judicata* can be applied to execution proceedings. Now the basis of any such application, where the party has not appeared and had not been heard, must be that he had had notice. O. 5, R. 17 lays down the manner in which processes are to be served, and O. 5, R. 19 says:

> "Where a summons is returned under R. 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

It is argued before us, and we think perfectly correctly, that as there has been no declaration by the Court in this case that the summons was duly served, the principle of *res judicata* cannot be invoked against the defendants. In this connection it is to be noticed that there has been an important change in the view of law taken owing to the recent decision of the Full Bench in *Arunachalam* v. *Veerappa Chettiar*[1] where it was held that O. 9, R. 13 does not apply to execution proceedings. (We understand that this defect will be shortly remedied.) The view that a party could apply to have an *ex parte* order set aside under O. 9, R. 13, which was taken in *Subbiah Naicker* v. *Ramanathan Chettiar*[2] and which the learned Subordinate Judge has taken in this case, is therefore incorrect; and in view

1. (1931) I. L. R. 55 Mad. 17: 61 M. L. J. 348 (F. B.).
2. (1914) I. L. R. 37 M. 462: 26 M. L. J. 189.

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of the fact that this relief is not now open to him, the remark in *Subramania Aiyar* v. *Raja Rajeswara Dorai*[1], which was made even before this decision, that the principle of constructive *res judicata* should be very cautiously applied to execution proceedings, becomes of still greater weight. Even before this Full Bench decision in *Sundararajulu* v. *Narayanaswami*[2] it was held that the Court must make an order as to the sufficiency of service if the doctrine of constructive *res judicata* is to be availed of. See also *Prithi Mahton* v. *Jamshed Khan*[3]. In the light of these decisions let us consider the reasons given by the learned Subordinate Judge for enforcing the doctrine as against the defendants in this case. He says that the 1st defendant came to know as early as February, 1927, of the previous applications and the orders passed thereon and that he admittedly made no attempt to set aside the orders on the previous applications either by an application under Order 9, R. 13, Civil Procedure Code, or by an appeal. He proceeds:

> "Assuming for the sake of argument, and only for the sake of argument, that the returns on the previous notices were either falsely or fraudulently made by the process-server at the instance of the decree-holder, the 1st defendant should have sought to set aside the orders on the previous execution application either by an application under O. 9, R. 13, Civil Procedure Code, or by an appeal. Having failed to do so, it is not open to him in the present proceedings to challenge the validity of the orders passed on the previous execution applications and the orders thereon operate as *res judicata* as against him."

Now, according to the Full Bench ruling, the remedy under O. 9, R. 13 is not open to him. There remains only therefore the remedy by way of appeal against the order itself. If he had gone up on appeal against either of these orders when he came to know of them, he would have been at once informed by the Appellate Court that both the petitions had either been dismissed or become inoperative, the petition for arrest owing to non-payment of batta, and the petition for transmission by the fact that the records had been returned to the transmitting Court since execution had not been applied for within six months. His appeal would, therefore, not have been entertained at all and he would have been left without any remedy. As against the view that since the imperative requirements of O. 5, R. 19 have not been carried out the summons cannot be held to have been served, no authority has been quoted to

1. (1916) I. L. R. 40 Mad. 1016 at 1026.
2. A. I. R. 1927 Mad. 813.
3. (1922) I. L. R. 1 Pat. 593.

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us. In *Mahomed Meera Rowther* v. *Kadir Meera Rowther*[1] there was a petition to set aside a sale from want of proper service of an attachment notice. That is a different matter for a sale cannot be set aside on the mere ground of irregularity in proceedings unless it can also be shown that the sale was materially affected by the irregularity. It may also be observed in that case that the learned Judge found that the circumstances of the case showed that as a matter of fact the judgment-debtor had full notice. On the other hand it was held in *Nusur Mahomed* v. *Kazbai*[2] that

> "Where the service of summons has been effected on a defendant by affixing a copy of the summons on the door of his dwelling-house, the Court must decide whether the summons has been duly served by such affixing or not, and, if it decides in the negative, a new summons must be issued, or substituted service directed. Before the Court can decide in favour of the sufficiency of this mode of service it must be satisfied that the defendant is keeping out of the way for the purpose of evading service".

In that case in spite of an order of the Court to the following effect "Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on the 22nd December, 1884, at 9 A. M., and proof of the same having been duly taken by me, it is ordered that the summons be returned." It was held that there was no sufficient service.

In the present case there is nothing to show that the Court even looked at one of the returns before ordering the petition. As stated above on Exhibit A the order "Arrest by 3rd August" is actually written under "not yet returned". In the second Exhibit A-1 it passed no sort of order holding the service sufficient.

In these circumstances it is unnecessary to go into the question whether the process-server exercised due diligence before affixing the notice or whether the return was fraudulent, but we cannot help observing that all the circumstances of the case raise a very great suspicion that the returns were fraudulent and that probably if the Court had proceeded to pass an order under Order 5, Rule 19, it is very doubtful whether it would have accepted these returns even on their face value as correct. The first point to be noticed about the returns is that, although Exhibit B is said to have been affixed on the 26th April, 1925, the endorsement of the amin is not made until the

1. 1914 M. W. N. 63. 2. (1886) I. L. R. 10 Bom. 202.

29th and although Exhibit B-1 is said to have been affixed on the 20th April, the endorsement is not signed until on 24th. If we compare these two endorsements with each other, the internal evidence suggests that they are fraudulent. It is stated in Exhibit B that when enquiries were made on the 26th April, 1925, the female inmates of the house said that the 1st defendant had gone a week ago to Madras. The notice was therefore affixed to the outer door of his dwelling-house. Therefore 1st defendant should have gone to Madras on the 19th April. In Exhibit B-1 it is said that with regard to that notice enquiries were made on the 20th April and the female inmates said that the 1st defendant had gone to Kurivi Kayampatti and other places two days before the receipt of the notice. Thus these two statements by the inmates of the house are flatly contradictory, because according to Exhibit B-1 the 1st defendant had left on the 18th not for Madras but for Kurivi Kayampatti. Looking to the compromise decree and to the fact that Exhibit A-1 was a mere petition for transfer 1st defendant could have had no reason for evading service. Therefore it cannot be that the women were uttering deliberate and inconsistent falsehoods. When we reflect that the decree was absolutely inexecutable except on the one matter of failure to hand over the management, on which execution was not being sought, that one of the petitions (that for arrest) was allowed to be dismissed for non-payment of batta and the other became infructuous by making no application for execution to the Court to which the decree was transmitted, and when we also look at the fact that both these execution petitions were on their face barred by limitation, suspicion becomes exceedingly strong that the whole matter was a ruse from the start by means of bogus service to secure by the plea of *res judicata* execution of an inexecutable decree. It is not, however, as we said, necessary for the purpose of this case to find that the service was not genuine though we strongly suspect it. It is sufficient to say that the Court has not declared it sufficient, as it is imperatively required to do under Order 5, R. 19, and in a case where it is sought to apply the constructive principle of *res judicata* against the defendants, the omission is fatal and the appeal must be allowed. We must, however, say that we have great doubts whether in any case the principle of *res judicata* by mere absence of the other party could in execution

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proceedings be pushed to the extreme to which it is sought to be done in this case. There is ample authority for instance that, where execution is taken out for an amount greater than that mentioned in the decree, failure to appear by the defendant would not act as *res judicata* and prevent him from showing in subsequent proceedings that that amount is not due. Vide *Kalyan Singh* v. *Jagan Prasad*[1] and *Ulaganatha* v. *Alagappa*[2]. The latter decision was by a member of the present Bench together with Sir Kumaraswami Sastri, J. An order of execution on such a decree, it was held, does not amount to an order to execute the decree for the exact sum named. The present case is a much more extreme instance. When by the terms of the compromise decree between the parties it has been specifically decided that the enforcement of the decree by means of execution is absolutely barred except on one matter, we are asked to hold that the mere failure to appear on notice of execution petition being taken out when execution is being sought not on that matter, will render every part of the decree executable in spite of the fact that the parties have agreed by the compromise that it is not executable, we should feel very great hesitation to concede such a thing. The only decision which approaches such a view is *Ram Kirpal* v. *Rup Kuari*[3]. In that case a Court having jurisdiction decided in the course of execution proceedings (in an order which was not appealed against) that the decree to be executed awarded mesne profits according to its true construction. In spite of a subsequent decision of the High Court that the decree on its true construction did not award mesne profits, the Privy Council held that the decision of the Court in execution proceedings had become final between the parties on general principles of law. In that case, however, the question as to whether the decree did or did not award mesne profits was specifically decided by a Court which, as observed by the Privy Council, was competent to decide the matter, whether it decided rightly or wrongly. That is altogether a different thing from saying that without any decision on the matter by a Court, a compromise decree which is by consent of the parties and by its express terms was deliberately made not executable becomes executable on a mere applied principle of constructive *res judicata*, because the

1. (1915) I.L.R. 37 All. 589. 2. A. I. R. 1929 Mad. 903.
3. (1883) L. R. 11 I. A. 37: I. L. R. 6 All. 269 (P. C.).

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defendants, having had notice, failed to appear on an execution petition. *Govinda Menon* v. *Krishna Mannadiar*[1] and *Dip Prakash* v. *Bohra Dwarka Prasad*[2] quoted for the respondent are not at all parallel. *Chidambaram Chetti* v. *Theivanai Ammal*[3] and *Nityananda Gantayet* v. *Gajapati Vasudeva Devu*[4] quoted for appellant are more in point. We should imagine also that there must be some distinctness on what matter the orders passed on the execution petitions are *res judicata*. In one of these petitions the only execution which could really have been held to be finally ordered was a mere transmission of the decree. In the other there was a mere order of arrest which was never carried out. Could those orders, without anything further, imply that the elaborate provisions of the decree by which disputes whether provided for or not in the scheme were to be referred to decision by the three families or to arbitration and were not to be taken to Court were to be regarded as superseded? Can relief No. 4 of the plaint which was expressly given up in para. 21 of the compromise decree be now obtained by this sort of constructive *res judicata*? We feel we should require very strong authority to accedé such propositions but it is not necessary in the view which we have taken to give any final decision on these matters.

In the result the appeal is allowed and the execution petition dismissed with costs in both Courts.

K. C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

A. Ramaswami Chettiar .. *Appellant** (*Petitioner—Decree-holder*)

v.

Chinnappa Chetty .. *Respondent* (*Respondent—1st Defendant*).

Ramaswami Chettiar *v.* Chinnappa Chetty.

Civil Procedure Code (V of 1908), O. 5, R. 19—Execution—Application for arrest out of time—Notice by Court within time—Proper service not made—Absence of declaration by Court of due service—Whether such notice in time could bar as res judicata *the objection to the application for arrest filed out of time.*

Where a decree-holder in execution applied for arrest of the defendant and the Court ordered notice on it, and the notice was the only one attempted

*A. A. O. No. 24 of 1929. 25th January, 1933.

1. (1923) 45 M. L. J. 71.
2. (1925) I. L. R. 48 All. 201.
3. (1923) I. L. R. 46 Mad. 768: 45 M. L. J. 346 (F. B.).
4. (1901) I. L. R. 24 Mad. 681: 11 M. L. J. 313.

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to be served on the respondent, the defendant in the case, and the return that was made on it was "1st defendant is absent. It is learnt that he went to Salem and other places. The notice was fixed on the outer door," on the question whether even though the application for arrest might have been out of time, the fact that the Court ordering notice on it in time rendered the matter *res judicata* so as to disable the defendant from raising the plea of limitation,

Held, that there having been no declaration by the Court under O. 5, R. 19, Civil Procedure Code, that the notice was duly served, there was not due service for the purpose of creating constructive *res judicata.*

Sundararajulu Naidu v. *Narayanaswami Naidu*, A.I.R. 1927 Mad. 813; *Ashagappa Chetti* v. *Ramanathan Chettiar*, (1932) 61 M. L. J. 629; *Gyanammal* v. *Abdul Hussain Sahib*, (1931) I. L. R. 55 Mad. 223: 61 M. L. J. 920 and *Subramania Aiyar* v. *Raja Rajeswara Dorai*, (1916) I. L. R. 40 Mad. 1016, referred to.

Appeal against the order of the District Court of Coimbatore, dated 9th April, 1928, in A. S. No. 151 of 1927 (E. P. R. No. 100 of 1927, in O. S. 738 of 1913, Coimbatore District Munsif's Court, Additional).

B. Sitarama Rao for appellant.

C. K. Viswanatha Aiyar for *T. M. Krishnaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—In this case the only matter which has been argued before me in second appeal is that even though the application for arrest on 26th November, 1923, might have been out of time, the fact that the Court ordered notice on it renders the matter that it was in time *res judicata.* This notice is the only one attempted to be served on the respondent, the 1st defendant in the case. The return that was made on it is, "1st defendant is absent. It is learnt that he went to Salem and other places. The notice was fixed on the outer door". It was not stated that this information was given to the process-server at the house of the 1st defendant nor who gave him the information. With regard to this, in the B Diary there is a note against 9—1—1924, "N. S. A. Arrest by 29—1—1924". I understand that "N. S. A." stands for "Notice served: absent". There was no declaration by the Court under O. 5, R. 19, Civil Procedure Code, that the notice was duly served. That this is not a due service for the purpose of creating constructive *res judicata* has been held in several cases. In *Subramania Pillai* v. *Subramania Aiyar*[1] the Court set aside a decree passed after such service. See also *Abraham Pillai* v.

1. (1897) I. L. R. 21 Mad. 419: 8 M. L. J. 84.

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Donald Smith[1] and *Baldeodas Lohia* v. *Subkarandas Goenka*[2]. In *Sundararajulu Naidu* v. *Narayanaswami Naidu*[3] Srinivasa Aiyangar, J., in a case very much like the present, held that where on the basis of service the rule of constructive *res judicata* was sought to be availed of, such service must have been declared to be sufficient. This decision was followed by Bardswell, J., and myself in *Ashagappa Chetti* v. *Ramanathan Chettiar*[4] and we distinguished in that case the one which has been quoted now for the appellant, namely, *Mahomed Meera Rowther* v. *Kadir Meera Rowther*[5]. In that case there was a petition to set aside a sale for want of proper service of an attachment notice. *Nusur Mahomed* v. *Kasbai*[6] referred to in that case and In re *Sri Krishna Doss*[7], a case of refusal of notice, do not deal with the question of constructive *res judicata* in execution applications. In *Farangu* v. *Hari Kishan*[8] the Court held that the acceptance of the service of such summons by the Court which issued it without any declaration was not conclusive on the matter of the service. *Gyanammal* v. *Abdul Hussain Sahib*[9] also allows a party to allege that the notice was not duly served on him when such service was sought to be used against him for the purpose of constructive *res judicata*. It was remarked in *Subramania Aiyar* v. *Raja Rajeswara Dorai*[10] that the principle of constructive *res judicata* should be very cautiously applied to execution proceedings, especially where there is any indication that improper services were being attempted and then the execution dropped in order that such notice may afterwards be argued as *res judicata* on the question of limitation. Both the Lower Courts have found as a matter of fact in this case that there was no proper service and that therefore the 1st defendant had no opportunity of raising the plea of limitation.

In the result the second appeal fails and is dismissed with costs.

K. C. *Appeal dismissed.*

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1. (1906) I. L. R. 29 Mad. 324.
2. (1924) I. L. R. 52 Cal. 179 at 186.
3. A. I. R. 1927 Mad. 813.
4. (1932) 64 M. L. J. 629.
5. 1914 M. W. N. 63.
6. (1886) I. L. R. 10 Bom. 202.
7. (1908) 19 M. L. J. 31.
8. A. I. R. 1929 Lah. 334.
9. (1931) I. L. R. 55 Mad. 223 : 61 M. L. J. 920.
10. (1916) I. L. R. 40 Mad. 1016.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE CORNISH AND MR. JUSTICE BARDSWELL.

The Madras Provincial Co-operative Bank, Ltd., Madras .. *Petitioner* (Assessee)*

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

F. B.

The Madras Provincial Co-operative Bank, Ltd. *v.* The Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), Ss. 8 and 10—Government of India Notification under S. 60, dated 25th August, 1925—"Profits of any Co-operative Society"—Interest from securities, if included therein—Interpretation of Statutes—Meaning of words—Continuous practice followed by legislation—Reference to—Permissibility.

The objects of the Madras Provincial Co-operative Bank were (*i*) to collect funds for financing Co-operative Societies, (*ii*) * * *, (*iii*) to purchase and sell Government Promissory Notes, and (*iv*) to carry on general business of banking. Its income was derived, *inter alia*, from interest on investments in Government securities. It was contended for the assessee that the purchase and sale of Government Promissory Notes having been found by the Income-tax Authority to be a part of its business, the interest derived therefrom constituted "the profits of a Co-operative Society" exempted from income-tax by the Notification of the Government of India, dated the 25th August, 1925.

Held, that the word "profits," as a subject of taxation, was distinct from, and did not include, interest on Government securities and that such interest was not exempted from income-tax under the Notification.

Norwich Union Fire Insurance v. *Magee*, (1896) 3 T. C. 457 and *Liverpool and London Globe Insurance Company* v. *Bennett*, (1913) A. C. 610: 6 T. C. 327, distinguished.

Commissioner of Income-tax, Madras v. *Madras Central Urban Bank, Ltd., Mylapore*, (1928) I. L. R. 52 Mad. 640: 56 M. L. J. 481: 3 I. T. C. 357 (F.B.), referred to.

In interpreting the word "profits" in the Notification, the continuous practice that had previously obtained treating the "profits of a business" and "interest on securities" as distinct subjects of taxation, can be referred to.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

In accordance with the High Court's order quoted above I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (3) of the Indian Income-tax Act (XI of 1922) (hereinafter referred to as the "Act").

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*O.P. No. 44 of 1932. 5th January, 1933.

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2. The petitioner, the Madras Provincial Co-operative Bank, Ltd. (formerly known as the Madras Central Urban Bank, Ltd. and hereinafter referred to as the "Society") is an Urban Society registered under the Co-operative Societies Act, 1912 (II of 1912). The main objects of the Society as set out in its bye-laws are: (1) to collect funds for financing Co-operative Societies, (2) to serve as the Provincial Apex Bank for the province of Madras, (3) to purchase and sell Government Promissory Notes (this clause was introduced on 21st December, 1929, while the appeal against the assessment for 1928-29 was pending), and (4) to carry on general business of banking not repugnant to the provisions of the Co-operative Societies Act and the rules framed thereunder for the time being in force. The Society derives income (*i*) from interest on the loans and advances made mainly to Central Banks and depositors, (*ii*) from interest on investments in Government securities, (*iii*) from interest on deposits, and (*iv*) from commission and fees.

3. Till the year 1927-28, the Society was being assessed on its income from interest on securities and deposits, as the other income was exempt from assessment under the Notification of the Government of India, dated 25th August, 1925, under S. 60 of the Act (copy of which is filed, marked Ex. A). At the time of its assessment for 1927-28, the Society contended that its entire income was exempt from income-tax by virtue of the notification mentioned above. I accepted the Society's contention regarding interest on deposits but held that interest on securities was not covered by the terms of the notification mentioned above. This point was therefore referred to the High Court and it decided the question against the Society in O. P. No. 202 of 1928. The judgment of the High Court is reported in *Commissioner of Income-tax, Madras* v. *Madras Central Urban Bank, Ltd., Mylapore*[1]. In 1928-29 and 1929-30 the Society was assessed on its income from interest on securities.

4. For the assessment of the year 1930-31 ("previous year," year ending 30th June, 1929) in response to a notice issued under S. 22 (2) of the Act, the Society filed a 'nil' return of income. It contended that its entire income was exempt under the Notification of the Government of India, dated 25th August, 1925, mentioned in paragraph 3 above and that therefore it was not liable to be assessed at all. The Society, however, in response to the notices issued under Ss. 22 (4) and 23 (2) of the Act, furnished the Income-tax Officer with the details of its income

1. (1928) I.L.R. 52 Mad. 640: 56 M.L.J. 481: 3 I.T.C. 357 at 360-362 (F.B.).

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from Government securities (both tax-free and taxed at source), of its borrowed capital and the average rate of borrowing for the purpose of calculating the allowance on account of borrowed capital. (This allowance is granted under the executive instructions of the Government of India contained in paragraph 28 of the Income-tax Manual.) On the basis of these details the Income-tax Officer computed the income from tax-free and taxed securities and the total and taxable income of the Society, as follows:—

		Rs.
Tax-free securities	..	29,855
Taxed securities	..	26,955
Total income	..	56,810
Deduct Tax-free securities	..	29,855
Taxable income	..	26,955

The Income-tax Officer overruled the Society's contention on the ground that it had been examined and rejected in the years preceding 1930-31. He therefore levied income-tax and super-tax on the above basis.

5. The Society appealed to the Assistant Commissioner raising the same contention as before the Income-tax Officer. The Assistant Commissioner overruled the Society's contention for the reasons stated in his appeal order relating to the assessments for the years 1928-29 and 1929-30, copies of which are filed, marked Ex. B.

6. The petitioner then filed an application before me under S. 66 (2) of the Act and required me to state a case and refer a question for the decision of the High Court. I declined to do so on the ground that no question of law arose in the assessment (1930-31) in view of the High Court's prior decision on the facts now put forward. A copy of my order is filed, marked Ex. C.

7. The petitioner thereupon moved the High Court under S. 66 (3) of the Act and in its order, dated 3rd May, 1932, the High Court has directed me to state a case and refer the following question:—

Question. "Whether on the finding that investment in Government securities forms a necessary part of the business of the assessee, the sum of Rs. 56,810 forms 'the profits of any Co-operative Society' within the meaning of the Notification of the Government of India, dated 25th August, 1925."

8. The question is based on the Assistant Commissioner's finding in Ex. B, viz., that investment in Government securities forms a necessary part of the business of the Society. No new facts, other than those that were before the Assistant Commis-

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deposits, and (4) from commission and fees. The money used to purchase Government Promissory Notes is the money collected by the Society in excess of the money required to finance Central Banks and depositors. The assessees claim that the dividends received from investments in Government securities are the profits of the Society and are, therefore, under the Government of India Notification exempt from payment of income-tax. This claim is based upon the contention that the purchase and sale of Government Promissory Notes is part of the business of the Society and that the Assistant Commissioner of Income-tax has found that such investment is a necessary part of the business of the Society. The bye-laws of the Society were amended on the 21st December, 1929, by the inclusion of object 3 to bye-law No. 1, namely, "to purchase and sell Government Promissory Notes". It is argued that the purchase and sale of Government Promissory Notes, therefore, is a part of the business of the assessee and that the profits derived from such purchase and sale are the profits of the Society. With regard to this argument, the interest derived from such securities must, of course, be taken as an item of receipt in arriving at the Society's profits and gains from the business but it does not, however, follow from this that the interest is a profit of the Society.

It is contended by the Commissioner of Income-tax that interest on Government securities has always to be taxed under S. 8 of the Indian Income-tax Act, whereas the profits of a business have always to be taxed under S. 10 of the Act and that it is the latter profits alone that are exempt under the notification. The Indian Income-tax Act in S. 6 states the heads of income chargeable to income-tax as follows:—

1. Salaries.
2. Interest on Securities.
3. Property.
4. Business.
5. Professional earnings.
6. Other sources.

In respect of these the tax is payable on (*i*) under S. 7, on (*ii*) under S. 8, on (*iii*) under S. 9, on (*iv*) under S. 10, on (*v*) under S. 11 and on (*vi*) under S. 12. Thus all the six sources of income are dealt with by separate sections. S. 8, as before-mentioned, provides for the taxation of "Interest on securities" and there is no other section which does; and it has been the custom ever since 1904, when the exemption of profits

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similar to those contained in the Government notification came into force, to interpret the exemption as it has been in this instance; and it is argued that the observations of Lord Macnaghten in *The Commissioners for Special Purposes of Income-tax* v. *Pemsel*[1] bear usefully upon this case. They are as follows:—

"I cannot help reminding your Lordships, in conclusion, that the Income-tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred ('Charities,' 1865). It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point of course is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment."

There is nothing new in the exemption contained in the Government notification. For years, the practice has been to interpret "profits" as not including interest on Government securities. Since 1904 such interest has always been taxed under S. 8 and it is difficult to imagine that Government's latest notification was intended to alter that practice. When an assessee is under a section of the Income-tax Act assessable to income-tax, it is for that person to show that he has been exempted; and in my view, the assessees here have failed to show that it was the intention of Government to exempt such interest. The mere fact that the bye-laws of the Society have recently been amended making the purchase and sale of Government Promissory Notes one of its main objects does not, in my view, alter the position. It is conceded that for years this Society has, even in the absence of such a bye-law, been investing its surplus collections in Government securities and that the interest received has been assessed to income-tax. An attempt was made recently by this Society to challenge that position in O. P. No. 202 of 1908 reported in *Commissioner of Income-tax, Madras* v. *Madras Central Urban Bank, Ltd., Mylapore*[2]. There the meaning of the same notification

1. (1891) A. C. 531 at 591.
2. (1928) I. L. R. 52 Mad. 640: 56 M. L. J. 481: 3 I. T. C. 357 (F. B.).

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had to be considered by a Full Bench of which I was myself a member. In that case, under orders of Government the Society was bound to keep 40 per cent. of its total liability under call deposits in a liquid or fluid form and instead of keeping these fluid assets in their safe or till it kept them in as nearly a fluid form as possible in Government securities upon which as in the present case they received interest. It was claimed by the Society that this was a part of the business of the Bank and that unless this interest was received the activities of the Bank would be seriously handicapped—exactly the same contention has been put forward here—and it was held that this investment in Government securities was not a part of the business of the Bank but that such investment fell under S. 8 of the Act. In the course of the judgment reference is made to some English decisions, two of which were relied upon here by Mr. Subbaroya Aiyar for the assessees, viz., *Norwich Union Fire Insurance* v. *Magee*[1] and *Liverpool and London Globe Insurance Company* v. *Bennett*[2]. In the former case the Company besides carrying on business in the United Kingdom carried on business in America and elsewhere. The laws of the United States in reference to the carrying on of insurance business there required the maintenance of a reserve fund there and in order to provide that reserve fund investments were made and interest earned. It was clear that the business of insurance could not be carried on in America without those investments being made there and it followed that the interest on those investments necessarily made for the purpose of the trade was part of the gains of that trade. As appears from the judgment in that case the Company did not invest in those foreign securities for the sake of investment or for the sake of making profit by those investments but for the sake of having a fund invested in America to answer the requirements of the American law. In the latter case the Company carried on business at home and abroad. As in the former case, by the laws of certain of the foreign countries in which it conducted its business the Company was required to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. The Company also voluntarily invested certain other

1. (1896) 3 T. C. 457. 2. (1913) A. C. 610: 6 T. C. 327.

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sums. It was held that interest on both classes of investments was assessable as being part of the business. As is observed in the judgment of the Full Bench, Hamilton, J., held that the voluntary investments were not for the sake of investments but for the sake of having a fund abroad readily realisable to meet the liabilities of their business and that the making of the investments was just as much part of their mode of conducting the business as the taking of risks and in the event of the current account at the Bank being insufficient to meet the liabilities all the investment funds might have to be called upon at some time or other. The object of the investment was to extend the business, so the making of them was part of the business. This the Full Bench held clearly distinguished *Liverpool and London Globe Insurance Company* v. *Bennett*[1] from the case before them. The Full Bench judgment goes on as follows :—

"It seems to me impossible, at least without a great deal more information than has been presented to us, to say that these investments of more or less amounts for a longer or shorter time on the part of the Bank in order to prevent their fluid assets from lying absolutely idle in their coffers, formed part of the business of the Bank. It seems to me that they are in the same position as any private person who with a large credit balance in his private account desires to put it into a remunerative form which shall at the same time be readily realisable and therefore invests for shorter or longer periods in Government paper".

and further:

"The obligation on the Bank to keep 40 per cent. of its total liabilities in a fluid form is in consequence of an administrative order of Government and does not oblige them, although it may permit them, to invest the fund at all, and it seems to me that as they are to hold the fund in readiness to meet some particular liability which is specified, it cannot be said to be part of their business as a Bank to invest these liquid assets in the interval."

It seems to me that no new facts are present now. The Society has continued to do that which it was then doing. No one suggests that the purchase and sale of Government Promissory Notes by the Society was, before the amendment of its bye-laws, *ultra vires*, and, in my opinion, the amendment does not in the least alter the position as it was at the time of the Full Bench decision already referred to.

For these reasons, in my opinion, the question referred to us must be answered in the negative. The assessees must pay the costs of the Commissioner of Income-tax, Rs. 250.

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1. (1913) A. C. 610: 6 T. C. 327.

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Cornish, J.—I am of the same opinion. I think there is no real substantial distinction between this case and *Commissioner of Income-tax, Madras* v. *Madras Central Urban Bank, Ltd., Mylapore*[1]. The exemption from income-tax given by the Notification is to the profits made by the petitioner from its business of a Co-operative Bank. Unless, therefore, the interest derived by the Bank from its money invested in Government Promissory Notes can be regarded as profits from the business carried on by the Bank it will not be exempt from tax. The petitioner relies on R. 1 of the Bye-laws which states that one of the main objects of the Bank is "to purchase and sell Government Promissory Notes". Taking this to mean that the Bank has been empowered to deal in Government Promissory Notes as part of its business, I should say that any profits made by the Bank from the purchase and sale of these securities on its own account or as broker for a constituent would be profits from the business of the Bank and exempt from tax under the Notification. But in the case before us nothing else appears except that the Bank has invested part of its funds in Government Promissory Notes and derived interest therefrom. If there was no opportunity of employing the money by lending it out to Central Banks (which is by R. 12 of the Bye-laws declared to be the primary purpose for which the Bank's funds are to be utilized), or by lending it to shareholders or constituents of the Bank (which the Bank is authorized to do by R. 13), the prudent course would undoubtedly be to invest the money in some easily realizable security. But there is nothing peculiar to the business of banking in taking this course. As a matter of construction of the bye-laws I hardly think that an investment in Government Promissory Notes of money lying idle in the Bank can be deemed to be one of the declared objects of the Bank. The petitioner having failed to show that the investment was made for carrying out some purpose for which the Bank has been founded, the only ground, as it seems to me, on which the interest from the investment might be held to be profits from the business disappears.

Bardswell, J.

Bardswell, J.—I agree that the interest derived by a Co-operative Bank from its investments in Government securities

1. (1928) I. L. R. 52 Mad. 640: 56 M. L. J. 481: 3 I. T. C. 357 (F. B.).

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is not to be regarded as part of the profits of its business *qua* such Bank. I would take it that the exemption is meant as an encouragement to the employing of as much capital as possible for the financing of Co-operative Societies and so extending the scope of Co-operation. The investing of money in Government securities does not further the cause of Co-operation but is only a means of keeping from lying idle funds that cannot immediately be used for such a purpose.

S. R. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE BARDSWELL.

Ignatia Brito and others .. *Appellants**

v.

T. P. Rego and others .. *Respondents.*

Ignatia Brito *v.* Rego.

Document—Construction—Tests as to a will and deed of settlement—Executant reserving a life-estate on some items of the properties—Whether reservation of life-estate rendered it otherwise than a deed of settlement.

A primary test of whether any particular document is a will or not is whether or no it is revocable. If it is irrevocable then it cannot be a will: *Rajammal* v. *Authiammal*, (1909) I. L. R. 33 Mad. 304 : 20 M. L. J. 519 and *Musstt. Sita Koer* v. *Munshi Deo Nath Sahay*, (1904) 8 C. W. N. 614.

Another test is that of whether a document confers an immediate right to property: *Muhammad Abdul Ghani* v. *Fakhr Jahan Begam*, (1922) L. R. 49 I. A. 195: I. L. R. 44 All. 301: 43 M. L. J. 453 (P. C.).

Even the reservation of a life-estate by the settlement does not render the instrument the less a settlement: *Rajammal* v. *Authiammal*, (1909) I. L. R. 33 Mad. 304 : 20 M. L. J. 519.

Where an executant of a deed of settlement of his properties on his children, stamped and registered as such, had reserved to himself possession with rights of enjoyment of some items for his maintenance but he made it clear that he was retaining no right of ownership in those items as the document recited "I have by this document established and given you right to items 1 and 2" and went on to say that his retention of enjoyment, which was to be along with his wife, was to be "without in any circumstances incurring debts on their security" and it further set out that a right to his wife and children in those two items " has been established by the document " while as to the properties generally it recited "if the properties covered by the deed of settlement are alienated debts, etc, incurred on this security, you shall be entitled to get possession of and enjoy them as you please according to the terms of settlement after getting cancelled such alienation and security bonds,"

Held, that the recitals clearly indicated that the disposition of property was to take effect at once and was irrevocable. Hence the document was not a will but a deed of settlement.

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*L. P. As. Nos. 17 to 19 of 1932. 25th January, 1933.

Ignatia Brito v. Rego.

Appeals preferred to the High Court under Clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Curgenven, dated 1st December, 1931 and made in A. A. A. O. Nos. 193, 195 and 194 of 1930 preferred to the High Court against the orders of the District Court of South Kanara, dated 25th August, 1930 and made in A. S. Nos. 260, 255 and 188 of 1929 preferred against the orders of the Court of the District Munsif of Mangalore, dated 20th June, 1929 and 26th March, 1929 and made in R. E. P. No. 205 of 1929 in O. S. No. 358 of 1926, R. E. P. No. 124 of 1929 in O. S. No. 214 of 1927 and R. E. P. No. 917 of 1928 in O. S. No. 569 of 1926 respectively.

T. M. Krishnaswami Aiyar for *J. A. Pinto* for appellants.

B. Sitarama Rao and *K. Y. Adiga* for respondents.

The Court delivered the following

JUDGMENTS. *Bardswell, J.*—The point to be decided is whether the document, Exhibit I, executed by John Joseph Brito on the 18th February, 1913, is to be taken as a will or as a deed of settlement. If it is a will then the appellants, who are his children, are his legal representatives, and their two-thirds share in his properties can be proceeded against in execution of decrees that have been obtained against him by the respondents. If, however, it is a deed of settlement, by which a present estate was conferred upon the appellants during their father's life-time, then the properties cannot so be proceeded against in execution. Bardswell, J.

The Trial Court held that Exhibit I was a deed of settlement, but on appeal the District Judge of South Kanara held that it was a will, and this finding has been upheld by Curgenven, J., on second appeal. In their view the main purpose for which the document was executed by J. J. Brito was to make arrangements for the disposal of his property after his death. It is pointed out that the wife is to get one-third of the property which is the share which she would receive in the case of an intestacy and that it is the wife who is to divide the properties among the children just as if she were an executrix; but most emphasis is laid on the fact that the document provides for the children's share to be divided, not only among the four children then living, but also among other children whom the wife might in the future bear to the executant; so

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that the share which each child was to have would not be ascertained till after the executant's death.

Exhibit I is styled as a deed of settlement and has been stamped and registered as such. A will need not be written on stamp, neither need it be registered, while its registration costs less than the registration of a deed of settlement. Had the executant intended the document to be a will, he would hardly have undergone this extra expenditure, besides which it has been laid down in *Mahadeva Iyer* v. *Sankarasubramania Iyer*[1] and reiterated in *Gangaraju* v. *Somanna*[2] that where an instrument is a deed in form there must be something very special in the case to justify its being treated as testamentary in character. Now a primary test of whether any particular document is a will or not is whether or no it is revocable. If it is irrevocable, then it cannot be a will. This has been pointed out in *Rajammal* v. *Authiammal*[3] and *Musstt. Sita Koer* v. *Munshi Deo Nath Sahay*[4]. Another test is that of whether a document confers an immediate right to property as has been pointed out by the Privy Council in *Muhammad Abdul Ghani* v. *Fakhr Jahan Begam*[5]. Even the reservation of a life-estate by the settlement does not render the instrument the less a settlement as is remarked in *Rajammal* v. *Authiammal*[3] already referred to. In Exhibit I the executant has reserved to himself possession with rights of enjoyment of items 1 and 2 for his maintenance, but he makes it clear that he is retaining no right of ownership in these items as the document recites "I have by this document established and given you right to items Nos. 1 and 2" and goes on to say that his retention of enjoyment, which is to be along with his wife, is to be "without in any circumstances incurring debts on their security". It further sets out that a right to his wife and children in those two items "has been established by this document," while as to the properties generally it recites "if the properties covered by this deed of settlement are alienated debts, etc., incurred on their security, you shall be entitled to get possession of and enjoy them as you please according to the terms of settlement after getting cancelled such alienations and security bonds". These

1. (1903) 18 M. L. J. 450. 2. A. I. R. 1927 Mad. 197.
3 (1909) I. L. R. 33 Mad. 304: 20 M. L. J. 519.
4. (1904) 8 C. W. N. 614 at 618.
5. (1922) L. R. 49 I. A. 195: I. L. R. 44 All. 301: 43 M. L. J. 453 (P.C.).

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recitals clearly indicate that the disposition of property was to take effect at once and that it was to be irrevocable. It is contended for the respondents that the provision as against alienations was only against alienations by way of security for debts and not as against other possible alienations, but that is not the way in which it runs while the contention is against the whole tenor of the document. I take it that the proper view is that, having disposed of his properties, the executant wished to show how absolute that disposition was by setting out that he could not even incur debts on their security. Curgenven, J., has felt a difficulty about this provision but has got over it by remarking "It may be said that the penalty which the executant imposed upon himself was in the circumstances very unlikely to be enforced and was of little practical importance compared with the dispositions of a testamentary character". I do not think that such a very clear provision can be brushed aside so lightly. Reference has been made by the learned advocate for the respondents to the Privy Council decision in *Udai Raj Singh v. Bhagwan Bakhsh Singh*[1] in which it was held that a document which had been registered as a deed was in fact a will in spite of a clause in it that the executant had relinquished all rights and proprietorship. That clause was explained away on the ground that it was probably to guard against the interference of certain relatives with whom, it was said, he had a blood feud. In like manner it is suggested that the provision against alienation in Exhibit I was meant merely to protect the property against creditors but it is not shown that this suggestion has any basis. I find it clear that the document not only makes an immediate disposition of the executant's properties but also that it was by its terms irrevocable.

Thus Exhibit I satisfies the main tests by which it can be seen whether any document is a will or a document of some other character. On the other hand the point of its making provision for children that may be born in future is not one of such importance by way of a test. It is conceded that provision for unborn children can be made in a deed of settlement and there was such a provision in the document which was found in *Mussit. Sita Koer v. Munshi Deo Nath Sahay*[2] to be not a will but a deed of settlement. The fact that the wife has to perform

1. (1910) L R. 37 I A. 46: I. L. R. 32 All. 227: 20 M.L.J. 458 (P.C.).
2. (1904) 8 C. W. N. 614.

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functions such as might be performed by an executor under a will is not, by itself, enough to make the document a will. It is pointed out that recitals in Exhibit I show that the executant apprehended that he might not live much longer, but this apprehension would be as good a reason for his wishing to make an immediate disposition of his property as for his wishing to dispose of it by will.

No doubt a document may be a will even if it is not so styled. Decisions have been quoted as to this: *Lakshmi* v. *Subramanya*[1], *Udai Raj Singh* v. *Bhagwan Bakhsh Singh*[2] and *Fielding* v. *Walshaw*[3]. In the last mentioned case the executant had expressly told the writer of the document that he had no intention of making a will. In none of these cases does there appear to have been any provision as to irrevocability. Nor was there any such provision in the document in question in the Privy Council case, to which Curgenven, J., has referred, in *Thakur Ishri Singh* v. *Thakur Baldeo Singh*[4]. The reason why that document was held to be a will was that it was registered as a will, though styled as a "tamilknama" (deed of assignment) and stamped as such albeit not correctly; that it provided for the contingency of a child being born when as yet there was no child; and that it did not purport to give anybody any possessory or present interest until the death of the donor. The circumstances of that case are very different from those of the case now under notice. In the same decision it is remarked that, of course, if the document affects the property in the lifetime of the executant, it cannot have a testamentary character.

In my opinion Exhibit I is not a will but a deed of settlement. The appeals must, therefore, be allowed with costs to the appellants on this appeal and on the first and second appeals and the orders of the Trial Court must be restored with the modification that execution may proceed against the one-third share of the properties allotted to the wife who was a party to the decree.

Beasley, C.J.

The Chief Justice.—I agree.

K. C. *Appeals allowed.*

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1. (1889) I. L. R. 12 Mad. 490.
2. (1910) L.R. 37 I. A. 46 : I. L. R. 32 All. 227 : 20 M. L. J. 458 (P.C.).
3. (1879) 27 W. R. 492.
4. (1884) L. R. 11 I. A. 135 : I. L. R. 10 Cal. 792 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD TOMLIN, LORD THANKERTON AND SIR GEORGE LOWNDES.

Ram Raghubir Lal and others .. *Appellants**

v.

The United Refineries (Burma), Ltd. and others .. *Respondents.*

P. C.

Ram Raghubir Lal
v.
The United Refineries (Burma), Ltd.

Transfer of Property Act (IV of 1882), Ss. 55 (4) (b) and 100—Civil Procedure Code (V of 1908), O. 34, R. 15—Limitation Act (IX of 1908), Arts. 111 and 116—Decree in suit to enforce vendor's lien for unpaid purchase money—Vendee's liability (for purposes of Art. 116, Limitation Act) arises upon a registered contract.

If a suit to enforce the vendor's lien for unpaid purchase money and for a personal decree against the vendee for the deficiency is decreed, the Court should, under S. 100, Transfer of Property Act, read with O. 34, R. 15, Civil Procedure Code, pass a preliminary decree for sale as in a suit on a mortgage.

In the case of a registered conveyance by way of sale, the personal liability of the vendee (for the unpaid purchase money) arises, in virtue of such conveyance, upon a contract in writing registered within the meaning of Art. 116 of the Limitation Act.

Tricomdas Cooverji Bhoja v. *Gopinath Jiu Thakur*, (1916) L.R 44 I A. 65: I. L. R. 44 Cal. 759: 32 M. L. J. 357 (P. C.), followed.

Judgment of the High Court, Rangoon, (I. L. R 9 Rang. 56), varied.

Appeal No. 130 of 1931 from a judgment and decree, dated the 10th September, 1930, of the High Court, Rangoon, setting aside a decree, dated the 16th July, 1929, of the District Court of Hanthawady.

The main question for determination in the present appeal was whether the 1st respondents, the United Refineries (Burma), Ltd., was entitled to recover the sum of two lakhs of rupees and interest from all or any of the appellants with a charge or lien on certain properties situate in the Hanthawady District.

The material facts of the case are set out in the judgment of the High Court, Rangoon, delivered by Carr, J. (Cunliffe, J., concurring) and reported in *Ram Ragubhir Lal* v. *The United Refineries (Burma), Ltd.*[1] and also in the Board's judgment.

Upjohn, K.C., De Gruyther, K. C. and *A. Pennell* for appellants.

K. Preedy for respondents.

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* P.C. Appeal No. 130 of 1931. 20th February, 1933.

1. (1930) I. L. R. 9 Rang. 56.

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20th February, 1933. Their Lordships' judgment was delivered by

SIR GEORGE LOWNDES.—On the 15th December, 1924, the first respondents (hereinafter referred to as the Company) agreed to sell to the firm of Kashi Vishwanath & Co. or their nominees or assigns certain immoveable property in the Hanthawady District of Burma, comprising 330 acres of land and the buildings and plant of an oil refinery erected thereon. The members of the said firm were the first two appellants before the Board and a third partner now deceased and represented by the fourth appellant. The consideration for the sale was set out in the agreement and included the sum of Rs. 2,00,000, which was to be paid three months after the registration of the sale deed.

On the 15th January, 1925, the sale deed was executed by the company as vendors, the conveyance being made by the direction of the firm to the third appellant as their nominee. Neither the firm nor any member of it was a party to the deed, but the direction to convey to the third appellant was recited therein, and a declaration to that effect under the signature of the firm was appended thereto. It was also recited that in respect of the Rs. 2,00,000 a joint and several promissory note had been executed by the firm and the third appellant to secure payment of that sum three months after registration.

The sale deed was registered on the 17th January, 1925, but the Rs. 2,00,000 was not paid, and on the 22nd September, 1927, the third appellant entered into an agreement for the re-sale of the property to the second respondent. This sale has fallen through, and for the purposes of the present appeal the second respondent, who has not appeared and against whom no relief is sought, may be disregarded.

On the 20th March, 1928, the company instituted a suit in the District Court of Hanthawady against the partners in the firm and the purchaser (the third appellant), praying a decree for Rs. 2,35,000, being the Rs. 2,00,000 above referred to with interest to date, and in default of payment for sale of the property, with a personal decree against the defendants for any deficiency. This was based originally on an alleged equitable mortgage of the property by deposit of title deeds, but by subsequent amendment it was supported by claiming a charge for unpaid purchase money.

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Various defences were raised to the suit, but the only question of substance now material is as to the personal liability of members of the firm, *i.e.*, appellants 1, 2 and 4. The claim to an equitable mortgage was not established, but both Courts in Burma affirmed the charge for Rs. 2,35,000 in respect of unpaid purchase money, and the propriety of this decision has not been seriously disputed before the Board. The question of the promissory note has also gone out of the case, as it was found not to be properly stamped and therefore inadmissible in evidence. The only other question raised on the appeal was as to limitation and it will be dealt with later.

The District Judge thought it sufficient to pass a decree in favour of the company merely declaring that it had a vendor's lien over the property in suit and awarding costs against the defendants. From this decree an appeal was taken to the High Court by the present appellants, and the company filed cross-objections claiming *inter alia* sale of the property and a personal decree for any deficiency. After a remand and a further finding by the District Judge on a question not now material, the learned Judges of the High Court delivered their final judgment on the 10th September, 1930. They affirmed (as already stated) the finding of the District Judge that the company had a vendor's lien over the property for the Rs. 2,00,000 with interest, but they set aside his decree as insufficient, and substituted a decree in the company's favour for

"(1) Rs. 2,35,000 (Rupees two lakhs and thirty-five thousand only) with further interest at 6 per cent. per annum from the date of suit to the date of realisation, charged on the property in suit.

(2) For the sale of the said property should the amount of the decree not be paid;

(3) For a declaration that the respondent-plaintiff company's charge over the property takes priority over any interest of the 4th appellant—4th defendant—company in the said property; and

(4) For a personal decree against the 1st, 2nd, 3rd and 5th appellants—1st, 2nd, 3rd and 5th defendants—for any portion of the decretal amount which may not be satisfied out of the sale proceeds of the property."

They also gave the company their costs in both Courts against the same parties.

It has been brought to their Lordships' notice that under S. 100 of the Transfer of Property Act, 1882, read with O. 34, R. 15 of the Code of Civil Procedure, the Court should have passed a preliminary decree for sale as in a suit on a mortgage, but no objection has been taken to the decree on this score, and

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as their Lordships are informed that the property has already been brought to sale, they do not think it necessary to lay stress upon this apparent irregularity.

The only part of the decree to which serious objection is taken by the appellants is sub-head (4), whereby a personal liability for the anticipated deficiency is laid upon all the present appellants. It is contended that though this order may be justified (subject to the question of limitation) in the case of the third appellant, the nominee purchaser, there is no such right against the other appellants who represent the firm of Kashi Vishwanath & Co.

The determination of this question depends in their Lordships' opinion upon the construction of the sale deed. The members of the firm were not parties to it and merely directed the vendors, as they had a right to do under the original agreement, to convey to the third appellant. The learned Judges of the High Court seem to have affirmed the liability of appellants 1, 2 and 4 merely by reason of the statement appended to the deed declaring the third appellant to be the nominee of the firm as purchaser and consenting to the conveyance to him. Their Lordships are unable to give this effect to the statement in question. Under the original agreement the company had bound themselves to accept as purchaser either the firm or a person nominated as such by the firm, and there was no provision that in the case of a nominee the firm were to remain liable for the balance of the purchase money. The conveyance was made to the third appellant as purchaser, reciting that the agreed part of the consideration had been made good by him, and that he was ready and willing to pay the outstanding balance of Rs. 2,00,000. Their Lordships can read this only as a substitution of the third appellant for the firm, and as leaving no liability upon the other appellants. They are therefore of opinion that the decree of the High Court was wrong in declaring the personal liability of appellants 1, 2 and 4 for the anticipated deficiency.

The question of limitation may be shortly disposed of. Having regard to the conclusion at which their Lordships have arrived above, the only question is whether the claim for a personal decree against appellant No. 3 was out of time. No issue as to limitation was raised in the District Court, but the matter was dealt with at length in the judgment of the High

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Court. The learned Judges held that the liability of the third appellant arose, in virtue of the conveyance, upon a contract in writing registered within the meaning of Art. 116 of the Limitation Act, and that the six years period allowed by that article applied, with the result that the suit was well within time. Their Lordships think that, having regard to the judgment of this Board in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*[1], this view was manifestly correct. It is therefore unnecessary for them to consider the applicability of Art. 111, by which a shorter period is prescribed, and upon which reliance is placed for the company in a case where (as here) no time was fixed for completing the sale and the purchase money in question was not payable until some date after conveyance of the property.

For the reasons appearing above, their Lordships think that a personal decree should only have been passed against the third appellant, and that the decree of the High Court should be varied by omitting from sub-head (4) thereof the reference to 1st, 2nd, and 5th appellants—1st, 2nd, and 5th defendants, the references to the 5th appellant and 5th defendant being taken to cover the present 4th appellant. The order for costs must, they think, be varied in the same way, the costs of the company in both Courts being ordered to be paid by the 3rd appellant only. There will be no order as to costs before this Board.

Their Lordships will humbly advise His Majesty to this effect.

Solicitor for appellants: *J. E. Lambert.*

Solicitors for respondents: *Holmes, Son & Pott.*

K. J. R. *Decree varied.*

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1. (1916) L. R. 44 I. A. 65: I. L. R. 44 Cal. 759: 32 M. L. J. 357 (P. C.).

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

Mahant Garuddas .. *Appellant**

v.

Mahant Laldas and another .. *Respondents.*

P. C.

Mahant Garuddas *v.* Mahant Laldas.

Hindu Law (Mitakshara School)—Inheritance—Whole blood and half blood—Uncles—Preference of whole blood not confined to case of brothers and brothers' sons, but of general application among sapindas of same degree of descent from common ancestor.

Under the Mitakshara, the rule of preference of the whole blood to the half blood applies to members of the same class, *i.e.*, to sapindas of the same degree of descent from the common ancestor. It is not confined to brothers and their sons only.

Held, accordingly, that as between paternal uncles of the propositus the whole blood exclude the half blood.

Ganga Sahai v. *Kesri*, (1915) L. R. 42 I. A. 177 : I. L. R. 37 A. 545 : 29 M. L. J. 329 (P. C.), followed.

Suba Singh v. *Sarafraz Kunwar*, (1896) I. L. R. 19 All. 215 (F. B.); *Sham Singh* v. *Kishun Sahai*, (1907) 6 C. L. J. 190; *Nachiappa Gounden* v. *Rangasami Gounden*, (1914) 28 M. L. J. 1 and *Jotindra Nath Roy* v. *Nagendra Nath Roy*, (1931) L. R. 58 I. A. 372 : 61 M. L. J. 442 (P. C.), referred to.

Judgments in *Vithalrao* v. *Ramrao*, (1899) I. L. R. 24 Bom. 317 and *Shankar Baji* v. *Kashinath Ganesh*, (1926) I. L. R. 51 Bom. 194 (F. B.) (laying down that the preference of the whole blood to the half blood is confined to the case of brothers and their sons), overruled.

Judgment of the Nagpur Judicial Commissioner's Court, reported in *Laldas* v. *Gurudas*, (1928) 24 N. L. R. 172 : A. I. R. 1929 Nag. 2, reversed.

Appeal No. 2 of 1930 from a judgment and decree, dated the 14th July, 1928, of the Court of the Judicial Commissioner, Central Provinces, which reversed a judgment and decree, dated the 30th September, 1926, of the Additional District Judge of Bilaspur.

The principal question for determination on the present appeal was, whether the plaintiff-respondent (who was an uncle of the half blood) was excluded by the defendant-appellant (who was an uncle of the full blood) from inheriting the estate of his deceased nephew, Bhagwatdas, under the Mitakshara Law.

The learned Judicial Commissioners, holding that under the Mitakshara the preference of the whole blood to the half blood in inheritance was restricted to the case of brothers and their sons only, decided against the present appellant.

Parikh for appellant.

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*P. C. Appeal No. 2 of 1930. : 28th February, 1933.

De Gruyther, K. C. (with *Wallach*) for plaintiff-respondent.

28th February, 1933. Their Lordships' judgment was delivered by

Sir George Lowndes.—The only question for determination in this appeal is as to rival claims to succession under the Hindu Law between uncles of the whole and of the half blood.

The parties are Grihastha Gosains, known as Mahants, and are governed by the Benares School of the Mitakshara. Their relationship will sufficiently appear by the following abbreviated pedigree in which names of females are printed in italics:

Dularkuar = Lakhmidas = *Phulkuar*

(by *Dularkuar*): Laldas. Bajrangdas.

(by *Phulkuar*): Ramkrishnadas=*Rajkuar* Garuddas

(son of Ramkrishnadas and *Rajkuar*): Bhagwatdas.

The property in question consists of 28 villages of the Ilaka of Lormi in the Bilaspur District of the Central Provinces, which came to Ramkrishnadas on a family partition. On his death they passed to his son Bhagwatdas, who died without issue on the 30th November, 1912. The villages then went to his mother, Rajkuar, as his heir, and on her death in 1914 to his paternal grandmother Phulkuar. She died on the 23rd October, 1922, when the disputed succession opened, the rival claimants being Garuddas, the father's brother of the whole blood, and Laldas and Bajrangdas, his half brothers. Garuddas obtained possession of the villages and Laldas sued him in the District Court of Bilaspur claiming a one-third share. Bajrangdas did not join in the suit but was brought in as second defendant.

The District Judge, following a decision of a single Judge of the superior court[1] in his Province, held Garuddas alone to be entitled to succeed, on the ground that as between sapindas in the same degree of descent from the common ancestor, those of the half blood were excluded by those of the whole blood. The decision in question was based upon the judgment of this Board in *Ganga Sahai* v. *Kesri*[1] to which more particular reference will be made hereafter. The suit was accordingly

1. The reference is to *Narain* v. *Hamraji*, (1924) 21 Nag. L. R. 163.—K. J. R.

1. (1915) L. R. 42 I.A. 177: I. L. R. 37 All. 545: 29 M. L. J.. 329 (P. C.).

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dismissed by the decree of the District Judge, dated the 30th September, 1926.

Laldas appealed to the Court of the Judicial Commissioner. His appeal was heard by Hallifax and Mohiuddin, A.J.C., who, differing from the District Judge, held that as between uncles no preferential right attached to the whole blood, and that the parties were therefore entitled to share equally. They accordingly set aside the decree of the Lower Court and passed a decree in favour of Laldas for a one-third share of the property with costs. No corresponding relief was given to Bajrangdas on the ground, apparently, that he had paid no court-fee. The decree of the Appellate Court was dated the 14th July, 1928.

From this decree Garuddas has appealed to His Majesty in Council. He is opposed by Laldas, the original plaintiff. Bajrangdas has not appeared.

The material text of the Mitakshara, Ch. II, s. IV, paragraphs 5 and 6 is in the following terms:—

> "Among brothers such as are of the whole blood take the inheritance in the first instance under the text 'to the nearest sapinda the inheritance next belongs,' since those of the half blood are remote through the difference of mothers. If there be no uterine brothers those by different mothers inherit the estate."

The question is whether this text enunciates only an exception to the general rule, confined to the case of brothers of the propositus, or whether it states a principle applicable to all sapindas in the same degree of consanguinity. The former view has been adopted by the Bombay High Court: *Vithalrao* v. *Ramrao*[1] followed in 1926 by *Shankar Baji* v. *Kashinath Ganesh*[2]; the latter, by the High Courts of Allahabad, Calcutta and Madras: *Suba Singh* v. *Sarafraz Kunwar*[3], *Sham Singh* v. *Kishun Sahai*[4] and *Nachiappa Gounden* v. *Rangasami Gounden*[5].

The learned Judicial Commissioners in the present case followed the earlier Bombay authority without considering the other cases above cited, though they were all elaborate and exhaustive judgments, and in the Allahabad and Madras cases were decisions of the Full Bench.

The rival authorities were before this Board in *Ganga Sahai* v. *Kesri*[6], to which reference has already been made. The

1. (1899) I. L. R. 24 Bom. 317. 2. (1926) I. L. R. 51 Bom. 194 (F.B.).
3. (1896) I.L.R. 19 All. 215 (F. B.). 4. (1907) 6 C. L. J. 190.
5. (1914) 28 M. L. J. 1.
6. (1915) L. R. 42 I. A. 177: I. L. R. 37 All. 545: 29 M.L.J. 329 (P.C.).

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decision in that case was that a paternal uncle of the half blood inherited in preference to the son of a paternal uncle of the whole blood, but Mr. Ameer Ali in delivering the judgment of the Board commented on *Suba Singh's* case[1] and with reference to the passage from the Mitakshara above quoted he says that there seems to be "in principle" no reason to differentiate between the brother of the propositus and the brother of his father. He continues:

"Having regard to the general scheme of the Mitakshara, their Lordships think that the preference of the whole blood to the half blood is confined to members of the same class, or to use the language of the High Court in *Suba Singh* v. *Sarafraz Kunwar*[1] to 'sapindas of the same degree of descent from the common ancestor'."

Dealing with *Ganga Sahai's* case[2] the learned Judicial Commissioners thought it impossible to find in the judgment of Mr. Ameer Ali any approval "even by the most distant implication" of what may be called here for convenience the Allahabad doctrine. Their Lordships would themselves have come to the opposite conclusion. Had this not been intended the judgment could hardly have characterised the preference of the whole blood to the half blood as confined to members of the same class of sapindas; it would almost obviously have been referred to as confined to the case of brothers.

The matter however is put beyond doubt by a more recent decision of this Board which was not available to the learned Judicial Commissioners: *Jotindra Nath Roy* v. *Nagendra Nath Roy*[3]. That was a case between bandhus. *Ganga Sahai's* case[2] was referred to and the passage quoted above from Mr. Ameer Ali's judgment was cited, clearly as laying down a rule of general application among sapindas, and the principle involved was held applicable even in the case of bandhus. From this it follows that as between paternal uncles of the propositus the whole blood will exclude the half blood.

For the reasons given their Lordships are of opinion that the appellant is solely entitled as the heir of Bhagwatdas to the villages in dispute. They will therefore humbly advise His Majesty that the decree of the Appellate Court should be set aside, and that of the District Judge, dated the 30th September, 1926, restored. The first respondent must pay the appellant's

1. (1896) I. L. R. 19 All. 215 (F. B.).
2. (1915) L. R. 42 I. A. 177: I. L. R. 37 All. 545: 29 M. L. J. 329 (P. C.).
3. (1931) L. R. 58 I. A. 372: 61 M. L. J. 442 (P. C.).

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costs in the Judicial Commissioner's Court and before this Board.

Solicitors for appellant: *T. L. Wilson and Co.*

Solicitor for plaintiff-respondent: *H. S. L. Polak.*

K. J. R. —— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON, MR. JUSTICE SUNDARAM CHETTY AND MR. JUSTICE MOCKETT.

Vadlamannati Bala Tripura Sundaramma *alias* Sundaramma .. *Appellant* in both (Plaintiff decree-holder)*

v.

Abdul Khadar .. *Respondent in both (2nd Defendant—2nd judgment-debtor in C. M. A. No. 51 of 1929, Defendant Judgment-debtor in C. M. A. No. 52 of 1929).*

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Limitation Act (IX of 1908), S. 15 (1) and Art. 180—Execution—Collateral litigation—Whether the decree in such a litigation can be considered an implied order staying execution application—Execution petition dismissed for default on the part of decree-holder—Fresh application after three years from the date of last order—Whether can be taken as continuing or reviving original execution application.

A mortgagee decree-holder filed an execution application for sale of mortgaged properties on 2nd October, 1922. It was dismissed on 16th January, 1923, owing to non-payment of batta for fresh sale notice as ordered by Court. Meanwhile third persons filed a suit against both the mortgagor and mortgagee, alleging that the mortgaged properties belonged to a public religious endowment and were as such inalienable and he sought a declaration from the Court to such an effect. That suit was decreed a day previous to the dismissal of the execution application. But on appeal the High Court reversed the decision of the Lower Court and dismissed the collateral suit on 16th August, 1927. The mortgagee decree-holder put in another execution application after the termination of the said appeal on 23rd September, 1927, but it was dismissed as time barred. On the questions whether the decree in the collateral litigation would be tantamount to an injunction staying the execution proceedings and whether the fresh application filed after three years would be taken to revive or continue the original application for execution filed by the decree-holder,

Held, that in order to make the provisions of S. 15 of the Limitation Act apply to this case, it must be shown that a suit or application of the decree had been stayed by an injunction or order. If the decree-holder could not bring herself within the exemptions provided for in the Act, she could not escape the bar of limitation by pleading in equity an implied order or a collateral litigation which would render her proceedings futile.

*A. A. Os. Nos. 51 and 52 of 1929. 14th September, 1932.

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Somshikhar Swami Guru v. *Shivappa Mallappa Hosmani*, (1923) 76 I. C. 557 and *Ram Bharosay* v. *Sohan Lal*, (1924) 82 I. C. 1, followed.

Satyanarayana Brahmam v. *Seethayya*, (1926) I. L. R. 50 Mad. 417: 52 M. L. J. 396; *Ammathayi Ammal* v. *Sivarama Pillai*, (1924) 48 M. L J. 74 and *Nagendra Nath Dey* v. *Suresh Chandra Dey*, (1932) L. R. 59 I. A. 283: 63 M. L. J. 329 (P. C), relied on.

Held also that since the earlier application for execution had been finally and properly dismissed for non-payment of batta and the later execution application was filed more than three years from the date of the order passed on the former one, it should be deemed to have been barred by limitation under Art. 180 of the Limitation Act.

In order to enable the later application to be treated as one in continuation or to revive the former one, there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which had existed but which had been subsequently removed

Case-law reviewed.

Appeals against the orders of the District Court of Kistna at Masulipatam, dated the 14th August, 1928 and made in E. P. No. 12 of 1928 and in E. A. No. 377 of 1928 in the said E. P. No. 12 of 1928 in O. S. No. 29 of 1918, respectively.

N. Sivaramakrishna Aiyar for appellant.

Ch. Raghava Rao, A. Sundaram Aiyar and *V. Krishna Mohan* for respondent.

The Court delivered the following

JUDGMENTS. *Jackson, J.*—In E. P. No. 12 of 1928 the appellant, the mortgagee decree-holder in O. S. No. 29 of 1918, Masulipatam, applied to sell the mortgage security. He cited a previous application, dated 2nd October, 1922, and claimed to be in time because " the plaintiff was restrained by an injunction from executing the mortgage decree, and the injunction was dissolved only on 16th August, 1927". Jackson, J.

The Court accordingly ordered sale on 5th April, 1928, but stayed it upon the respondent judgment-debtor's objection that the execution application was time barred, and finally by its order, dated 14th August, 1928, dismissed the application as barred by limitation. Hence the appeals.

We do not find that the Court had debarred itself from going into the question of limitation by ordering sale. If it had been misled by the appellant into thinking that there was no question of limitation it did right to go into the matter before the execution was concluded. This disposes of C. M. A. No. 52.

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The appellant no longer maintains that there was an injunction as originally stated. But she argues that there was a decree, which in its effect was tantamount to an injunction, and which therefore attracted the provision of S. 15, Indian Limitation Act. The exact words of that section applicable to this case are: "In computing the period of limitation prescribed for any application for the execution of a decree, the execution of which has been stayed by injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded".

Eight months after the appellant obtained her decree certain worshippers impleading both the mortgagor and the mortgagee got it declared that the security of the mortgage was a religious endowment and not the property of the mortgagor in the decree in O. S. No. 14 of 1920, Sub-Judge, Masulipatam, and it is this decree which the appellant asks us to treat as an order staying the execution of her prior decree, until it was set aside on appeal by the High Court on 16th August, 1927.

The learned District Judge has found that the petitioner was not restrained or prevented from executing her decree, and if she had applied for execution the Court could not have refused to execute.

In our opinion this is correct. Suppose in a similar case the mortgagor was possessed of much property besides the mortgaged property. The decree-holder could put in his application for execution, sell the property with the blot on the title for what it was worth, or have it recorded that the property was legally extinct [see *Chand Mall Babu* v. *Ban Behari Bose*[1]] and then apply for a personal decree; and to say that in these circumstances execution has been *stayed*, is to wrest the expression entirely away from its ordinary meaning.

To maintain her argument the appellant must read *stayed* as *inconvenienced*, and it remains to see whether the case-law supports that interpretation. There appears to be no Madras case directly in point. The two Bombay rulings in *Somshikhar Swami Guru* v. *Shivappa Mallappa Hosmani*[2] and *Ram Bharosay* v. *Sohan Lal*[3] run on all fours with the present case

1. (1923) I. L. R. 50 Cal. 718. 2. (1923) 76 I. C. 557.
3. (1924) 82 I. C. 1.

and negative the appellant's view. In regard to the institution of suits, not the execution of decrees, it is held in *Satyanarayana Brahmam* v. *Seethayya*[1] that no equitable grounds for the suspension of a cause of action can be added to the provisions of the Indian Limitation Act and a decree cancelling a promissory note as fraudulent is no stay of a suit upon the note. This judgment does not seem to have been brought to the notice of the Bench in *Lakshminarayana* v. *Lakshmipathi*[2] and there the ruling is to the exact contrary—that the decision in the collateral suit was in substance one which prevented the filing of a suit upon the note. Two cases are cited by that Bench in support of its view: *Pandey Satdeo Narayan* v. *Srimati Radhey Kura*[3] and *Satish Mohini Debya* v. *Pabna Bank, Ltd.*[4] In the Patna case the decree-holder was ordered to furnish security for half a lakh before executing his decree, and that order is interpreted as one staying the execution; there is no question of collateral decrees.

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In *Satish Mohini Debya* v. *Pabna Bank, Ltd.*[4] it is also found that there is an order amounting to a stay. "Execution was clearly stayed by the order of 27th May—the Judge struck off the execution case for the present." Again, there is no question of a collateral decree, so *Lakshminarayana* v. *Lakshmipathi*[2] seems to stand alone, and of the two contradictory judgments we prefer *Satyanarayana Brahmam* v. *Seethayya*[1] as correctly stating the law.

In *Muthu Korakkai Chetty* v. *Madar Ammal*[5] the question was referred to a Full Bench whether the cause of action for delivery to which Art. 180, Indian Limitation Act, applies is suspended during the pendency of proceedings for the setting aside the sale, and this question attracted a general discussion of limitation covering a wide range. On p. 208 Sadasiva Aiyar, J., found that the sale was not finally approved till the proceedings to set it aside for fraud had terminated, a case very much on all fours with *Baijnath Sahai* v. *Ramgut Singh*[6] when a revenue sale was held to be finally confirmed after various proceedings. He then enunciates a principle underlying this ruling "that whenever proceedings are being

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1. (1926) I. L. R. 50 Mad. 417: 52 M. L. J. 396.
2. (1927) 53 M. L. J. 520.
3. (1919) 5 Pat. L. J. 39.
4. (1918) 47 I. C. 907.
5. (1919) I. L. R. 43 Mad. 185: 38 M. L. J. 1 (F. B.).
6. (1896) L. R. 23 I. A. 45: I. L. R. 23 Cal. 775 (P. C.).

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conducted between the parties *bona fide* in order to have their mutual rights finally settled, the cause of action for an application, the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights."

It can hardly be said that *Baijnath Sahai* v. *Ramgut Singh*[1], and the other case cited, *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*[2], lay down any such general proposition. These cases decide as a matter of fact that in certain circumstances a cause of action arose upon a certain date, and it would be very dangerous to proceed as though their underlying principle contained a general proposition of statutory force.

The next case which is cited, *Nrityamoni Dassi* v. *Lakhan Chandra Sen*[3], requires to be read with care. As stated in the opening sentence it is a general concurrence with the judgment under appeal, reported in *Lakhan Chunder Sen* v. *Madhusudan Sen*[4], a case in which *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*[2] and *Prannath Roy Chowdry* v. *Rookea Begum*[5] have been followed. In the latter case it is found on p. 357 that it would be an inconsistent course in the Courts to hold that the pendency of a litigation furnished no "good and sufficient cause" for the appellants not proceeding with his own claim. The words in inverted commas are a quotation from an exception to certain Bengal Regulations referred to on p. 253 of this same Vol. 7. "But certain exceptions are introduced into those" Regulations, amongst others, that the limitation "of twelve years is not to apply where the party has been precluded by good and sufficient cause from bringing his suit within that period". It cannot be said that the series of cases ranging from *Prannath Roy Chowdry* v. *Rookea Begum*[5] to *Nrityamoni Dassi* v. *Lakhan Chandra Sen*[3] have superimposed upon the Indian Limitation Act some provision which finds no place among its sections. On p. 209 in *Muthu Korakkai Chetty* v. *Madar Ammal*[6] Mr. Justice Sadasiva Aiyar re-states the principle in these terms:

1. (1896) I. L. R. 23 I. A. 45: I. L. R. 23 Cal. 775 (P. C.).
2. (1868) 12 M. I. A. 244.
3. (1916) I. L. R. 43 Cal. 660: 30 M. L. J. 529 (P. C.).
4. (1907) I. L. R. 35 Cal. 209.
5. (1859) 7 M. I. A. 323.
6. (1919) I. L. R. 43 Mad. 185: 38 M. L. J. 1 (F. B.).

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"A person is not bound to bring an unnecessary suit or to make futile and unnecessary applications during the course of other litigation proceedings for the settlement of the same rights."

But that seems rather to beg the question. If the application is one which must be made in order to save the bar of limitation it is neither futile nor unnecessary. As observed by Mr. Justice Seshagiri Aiyar in the same case on p. 211, the Judicial Committee have held that exemptions not covered by the sections of the Indian Limitation Act should not be imported by Courts to relieve a party from the bar of limitation, and this principle is not overlooked in the six Privy Council cases which he cites including *Nrityamoni Dassi* v. *Lakhan Chandra Sen*[1]. The Officiating Chief Justice speaks to the same effect on p. 200. "It is hardly to be inferred from such observations that the Privy Council intended to lay down any rule other than those mentioned in various sections of the Indian Limitation Act." In *Satyanarayana Brahmam* v. *Seethayya*[2] it is also held that whatever view be taken of *Nrityamoni Dassi* v. *Lakhan Chandra Sen*[1] no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. *Ammathayi Ammal* v. *Sivarama Pillai*[3] is to the same effect.

A recent Privy Council case *Nagendra Nath Dey* v. *Suresh Chandra Dey*[4] lays down that though in theory some rule in regard to collateral litigation may be intelligible, when, however, there is no such rule in the Act, the only practical course is to interpret and follow the Act's provisions. We agree and hold that if the appellant cannot bring herself within the exemptions provided for in the Act, she cannot escape the bar of limitation by pleading in equity an implied order or a collateral litigation which would render her proceedings futile.

It remains to consider whether the Execution Petition which was dismissed on 16th January, 1923, can be treated as revived by the present Execution Petition so that no question of limitation need arise.

There is no doubt that the execution petition was dismissed because batta was not paid, and it is difficult to see how a petition dismissed for that reason can possibly be revived. I have had the advantage of reading the judgment of my learned

1. (1916) I. L. R. 43 Cal. 660: 30 M. L. J. 529 (P.C.).
2. (1926) I. L. R. 50 Mad. 417: 52 M. L. J. 396.
3. (1924) 48 M.L.J. 74. 4. (1932) L.R. 59 I.A. 283: 63 M.L.J. 329 (P.C.).

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brother which is about to be delivered on this point, and entirely agree with his conclusion, and the statement of the case-law upon which it is founded.

The appeals therefore must be dismissed with costs.

Sundaram Chetty, J.—The appellant in these appeals filed O. S. No. 29 of 1918 in the District Court, Masulipatam, on a mortgage bond and obtained a preliminary decree for sale of the mortgaged properties on 4th November, 1919. The final decree in that suit was passed on 27th March, 1922. She filed E. P. No. 57 of 1922 on 2nd October, 1922, praying for the sale of the mortgaged properties for the realisation of the decree amount. That petition was dismissed on 16th January, 1923. In 1919, one Mahomed Yusuff and another filed a suit in the District Court of Kistna at Masulipatam which was subsequently transferred to the Court of the Subordinate Judge, Masulipatam and numbered as O. S. No. 14 of 1920, in which the present appellant and also the mortgagors who executed the mortgage deed on which the decree in O. S. No. 29 of 1918 was passed were also impleaded as defendants. The plaintiffs therein contended that the mortgaged properties belonged to a mosque which was a public religious endowment and were inalienable and prayed for a declaration that the mortgage deed was invalid and unenforceable. That suit was decreed on 15th January, 1923 and the declaration sought for was accordingly given. The present appellant who was impleaded as the 2nd defendant in that suit preferred an appeal to the High Court against that decision (A. S. No. 349 of 1923). That appeal was allowed and the plaintiffs' suit brought on behalf of the mosque was dismissed on 16th August, 1927. Subsequently, the present application for the execution of the decree in O. S. No. 29 of 1918 was filed by the decree-holder on 23rd September, 1927. The contention of the judgment-debtors is that this application for execution is barred by limitation. The learned District Judge upheld this objection and dismissed the execution petition.

The appellant puts forward several grounds in support of the contention that the present execution application should be held to be not barred by limitation. I propose to deal with one of those contentions and, that is, that the present E. P. No. 12 of 1928, filed soon after the High Court decision, must be deemed to be one for the revival of the former E. P. No. 57 of 1922, which was dismissed on 16th January, 1923. In order to

apply the principles of law relating to the doctrine of revival, it would be well to ascertain what the exact facts in this case are. In E.P. No. 57 of 1922 the prayer was for the sale of the mortgaged properties. On 17th November, 1922, notice of sale to the judgment-debtors was ordered fixing the hearing date as 12th December. On the latter date, the judgment-debtors were absent and the notices were found to have been affixed. Finding that the service was not sufficient, the Court ordered fresh sale notice to be taken out by the decree-holder and fixed the hearing date as 16th January, 1923. When the petition was taken up for disposal on that date it was found that no batta was paid for fresh sale notice as ordered by the Court. On the express ground that no batta was put in, the petition was dismissed on that day without costs. Thus ended E. P. No. 57 of 1922. It is true that on 15th January, 1923, the judgment in O. S. No. 14 of 1920 was pronounced by the Subordinate Judge, declaring that the mortgage in question was invalid and not binding on the trust. It may be contended with some show of reason, that even in the absence of an injunction restraining the sale of the properties in execution of the mortgage decree in O. S. No. 29 of 1918, the declaration of the invalidity of that mortgage would be an obstacle to pursue the execution of the mortgage decree by seeking to sell the mortgaged properties. I am not however dealing with that point. What is stated in ground No. 13 in the memorandum of appeal in C. M. A. No. 51 of 1929 is, that E. P. No. 57 of 1922 was dismissed on 16th January, 1923, in consequence of the judgment in O. S. No. 14 of 1920, dated 15th January, 1923. If the statement is correct, it may very well be contended that the present execution application may be deemed to be one for the revival of the former one which was wrongly dismissed by reason of an obstacle which was subsequently removed and for no fault or neglect of the decree-holder. But as I have set forth above, the dismissal of E. P. No. 57 of 1922, as would appear from the orders thereon, was due to the non-payment of batta for fresh sale notice as ordered by the Court. There is nothing to show that by reason of the adverse decision in O. S. No. 14 of 1920 the executing Court dismissed that petition on the ground that the properties could not be put up for sale. In the absence of any sort of proof in support of the assertion made in ground No. 13 of the appeal memo and in the face of

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the express order of the Court passed on 16th January, 1923, the only possible conclusion in this case is that that petition was dismissed on that date on account of the failure of the decree-holder to pay batta for fresh sale notice as ordered by the Court.

Though O. 9 and O. 17, Civil Procedure Code, do not apply to execution proceedings, still the Court has, doubtless, inherent power to dismiss an application for execution when the applicant makes default in the payment of batta which is necessary to put the Court in a position to proceed with the application. That being so, the dismissal of the E. P. on 16th January, 1923, on account of the default of the decree-holder due to her own laches was a proper and final disposal of that petition. The principle of law deducible from a long course of decisions seems to be, that an application for execution which has been finally and properly dismissed cannot be revived. This principle has been clearly stated in the decision in *Suryanarayana Pandarathar* v. *Gurunada Pillai*[1]. In that case, the application filed in September, 1892, was found to have been properly dismissed, as it was filed in contravention of the previous order of the Court. The fresh application for execution which was filed in October, 1895, could not be treated as a renewal of the application filed in September, 1892, as the latter application was finally and properly dismissed. The same view has been expressed by Ramesam, J. in the decision reported in *Lahimiya* v. *Masur Hannisa*[2] in the following passage:

> "Not unless there was a suspension without any default on her part can the principle of revival of a former execution petition be utilised in favour of the appellant."

The learned Advocate for the appellant referred us to several decisions in support of his contention, but none of those decisions has proceeded on any ground inconsistent with the principle stated above and all those decisions are clearly distinguishable and cannot help the appellant in this case. Where an execution petition can be deemed to have been not finally disposed of and can be treated as still pending in the eye of law, the subsequent execution application may be treated as one for the continuance of the former one. Where the former execution application was dismissed finally, but for some reason (not due to any default or neglect on the part of

1. (1897) I. L. R. 21 Mad. 257: 8 M. L. J. 25.
2. (1926) 95 I. C. 718.

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the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one. For all intents and purposes, there is not much difference between revival and continuation of the former application. The same principle however applies in both cases. In the decision in *Sasivarna Tevar* v. *Arulanandam Pillai*[1] it was held that the District Munsif had no legal authority to dismiss the execution petition simply because execution was stayed by the Sub-Court. The words " struck off " were taken to be not a dismissal. In this view, the execution petition was held to be pending in the eye of law and therefore the later application was treated as one to continue the pending proceedings. The Full Bench decision in *Suppa Reddiar* v. *Avudai Ammal*[2] is based on the same principle. In that case, the execution petition, dated 15th June, 1898 and filed by the assignee-decree-holder was dismissed on the ground that the assignment of the decree was for the judgment-debtor's benefit, and consequently the petitioner was not entitled to execute the decree. But in a suit filed by the assignee-decree-holder, it was declared that the assignment of the decree was not for the benefit of the judgment-debtor. The subsequent execution petition filed by the assignee-decree-holder on 24th November, 1902, was therefore treated as one to revive or continue the former execution petition which was wrongly dismissed by the Court. In the case reported in *Chalavadi Kotiah* v. *Poloori Alimelammah*[3] the dismissal of the execution petition, because execution was ordered to be stayed by another Court, was held to be a wrong order. It was also found that the dismissal of the execution petition was without notice to the parties. That being so, the execution petition was treated as one pending in the eye of law and therefore the later execution petition was treated as one for the continuance of the pending proceedings. The principle relating to revival as stated in this case was approved in the decision in *Manyam Surayya* v. *Sunkavilli Venkataratnam*[4]. That decision does not in any way help the appellant's contention, that even if the former execution petition was rightly dismissed, the fact that

1. (1897) I. L. R. 21 Mad. 261: 8 M. L. J. 18.
2. (1904) I. L. R. 28 Mad. 50: 14 M. L. J. 401 (F. B.).
3. (1907) I. L. R. 31 Mad. 71 · 18 M. L. J. 46.
4. (1923) I. L. R. 47 Mad. 176: 45 M. L. J. 822.

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there was an obstacle to execution by reason of another decision would itself entitle the applicant to have the later execution petition filed beyond three years treated as one in revival of the former application. It seems to me clear that there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which then existed but which was subsequently removed, in order, to entitle the applicant to have the later application treated as one in continuation of or to revive the former one.

In *Raghunandun Pershad* v. *Bhugoo Lall*[1] it was held that the second application could not be deemed to be one for the revival of the first. The interruption to the execution proceedings must have been due to an intermediate order which was afterwards set aside or the execution proceedings must have been rendered infructuous by some such obstacle and the interruption to the execution should not have been occasioned by any fault or laches of the applicant. This was held to be the test for applying the principle of revival. To the same effect is the decision in *Raghunath Sahay Singh* v. *Lalji Singh*[2]. The view taken in the decision in *Narayan Govind Manik* v. *Sono Sadashiv*[3] is virtually the same. As the original application of January, 1888, was found to have been wrongly dismissed on the ground that a suit for the removal of the obstruction was pending, the later execution application was taken to be one to revive the previous one which had been suspended pending litigation. Much reliance was placed on behalf of the appellant on the Privy Council decision in *Qamar-ud-din Ahmad* v. *Jawahir Lal*[4]. In that case, on the execution application filed in August, 1888, execution was allowed to proceed by an order, dated 18th December. On 29th November, 1889, it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On the 23rd December it was ordered that the record be not sent to the Collector's Court as the decree-holder had not made the deposit on account of the transfer. Against the order of 18th December, 1888, allowing execution to proceed, an appeal was preferred to the High

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1. (1889) I. L. R. 17 Cal. 268.
2. (1895) I. L. R. 23 Cal. 397.
3. (1899) I. L. R. 24 Bom. 345.
4. (1905) L. R. 32 I. A. 102: I. L. R. 27 All. 334: 15 M. L. J. 258 (P. C.).

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Court which reversed that order and in a further appeal to the Privy Council the order allowing execution was restored on 12th December, 1894. Then an application for execution was made on 23rd November, 1897, which was held to be one to revive a pending execution petition suspended by no act or default of the decree-holder. Their Lordships have clearly held that order, dated 23rd December, 1889, was in no sense a final order. It was also held that the interruption to or suspension of execution was not due to any act or default of the decree-holder. In such circumstances the decree-holder was found to be entitled to come again to the Court and ask for the revival or continuance of the former petition.

None of the decisions referred to above can be utilised to justify the appellant's contention pressed for acceptance in this particular case. The present case according to the facts established is not one in which the bar of limitation could be got over by invoking the principles governing revival. As was held in *Suryanarayana Pandarathar* v. *Gurunada Pillai*[1], the former E. P. No. 57 of 1922 having been finally and properly dismissed it could not be revived by the present E. P. No. 12 of 1928. This being a fresh application for execution, it must be deemed to be barred by limitation under Art. 182 of the Limitation Act, as it was filed more than three years from the date of the final order passed on the former application, namely, 16th January, 1923.

As regards the other points involved in these appeals, I am in entire agreement with the conclusions arrived at by my learned brother in his judgment. I accordingly agree that these appeals should be dismissed with costs.

Mockett, J

Mockett, J.—I have had the advantage of reading the judgments of my learned brothers and I am in complete agreement with the views that they have expressed on both the points raised in this appeal. I would only add this: S. 15 of the Limitation Act is explicit in its terms. In order to call its provisions in aid it must be shown that a suit or application for the execution of a decree has been stayed by an injunction or order. The authorities bearing on the question have been fully discussed at the Bar during the arguments in this appeal. After considering them I do not think that there is any real basis for

1. (1897) I. L. R. 21 Mad. 257; 8 M. L. J. 25.

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the view that equitable considerations can be introduced into the very clear provisions of the section. The injunction or order must be express in its terms and I find no room for the suggestion that an application can be stayed by implication. The trend of the Privy Council decisions seems to be to this effect and in the recent case of *Nagendra Nath Dey* v. *Suresh Chandra Dey*[1] their Lordships explicitly lay down that "in construing questions of limitation equitable considerations are out of place".

I am therefore constrained to join in expressing respectful dissent if any of the Indian cases cited lend colour to the doctrine that although an injunction or order does not in its terms effect a stay nevertheless it can be said to do so "equitably" or "by implication". I accordingly agree with the order proposed.

K. C. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE SUNDARAM CHETTY.

Sivasubramania Thevar .. *Appellant* (1st Defendant)*

v.

Dewan Bahadur T. N. S. Theerthapathi, Zamindar of Singampatti .. *Respondent (1st Plaintiff).*

Sivasubramania Thevar v. Zamindar of Singampatti.

Lease—Oral lease—Mode of creation—Auction of lands for lease—Acceptance of highest bid—Payment of deposit and delivery of possession—Written documents subsequently passing between parties—Oral lease if superseded—Suppression of documents by party—Proof of contents by secondary evidence—Evidence Act (I of 1872), S. 65.

The plaintiff's lands were leased by public auction in March, 1921, for a period of seven years. The defendant secured the lease for a certain amount and deposited a portion thereof before the selling officer, the balance remaining to be paid in yearly instalments. The defendant was let into possession of the lands in July, 1921, that is, at the commencement of the lease term and he continued in possession until, as a result of proceedings taken by the plaintiff in 1924 under S. 145, Criminal Procedure Code, a receiver was appointed. The plaintiff sued for an injunction restraining the defendant from interfering with his possession or that of his other lessees, and in the alternative for delivery of possession if it were found that the defendant was in possession. It was alleged in the plaint that the lease in favour of the defendant was only for a period of one year and the plaintiff relied on the auction list, a muchilika executed by the defendant a day after the auction, and an agreement, dated 15th June, 1921, for showing that the original lease was superseded by a later lease in writing. The auction list

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*Appeals Nos. 59 and 157 of 1927. 14th February, 1933.

1. (1932) L. R. 59 I. A. 283: 63 M. L. J. 329 at 335 (P. C.).

and the muchilika, which were with the plaintiff, were not, however, produced and the plaintiff sought to establish their contents by secondary evidence in the shape of admissions made by the defendant. The agreement relied on contained the terms upon which the defendant was to hold the leased property.

Held, that a completed oral lease came into existence on the acceptance by the selling officer of the defendant's bid, that the documents which came into existence subsequently did not supersede the oral lease and the plaintiff was consequently not entitled to the relief prayed for.

Held further, that the plaintiff having suppressed the auction list and the muchilika could not be permitted to establish their contents by secondary evidence.

Appeals against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 17 of 1925.

K. Rajah Aiyar, K. Venkateswara Aiyar and *K. S. Rajagopalachari* for appellant.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *L. S. Veeraraghava Aiyar* for respondent.

The judgment of the Court was delivered by

Curgenven, J.

Curgenven, J.—The suit out of which these appeals arise was brought by the Zamindar of Singampatti and three other plaintiffs in the following circumstances. With the object of leasing certain home-farm lands within the Zamindari for a term of seven years (faslis 1331 to 1337) an auction was held in March, 1921, the lease to go to the competitor who bid the highest lease amount. The 1st defendant (hereafter to be called the defendant) secured it for a sum of Rs. 9,000. Towards this amount he deposited Rs. 500 on 14th March, and the balance was to be paid in five yearly instalments of Rs. 1,500 and a final instalment of Rs. 1,000. By March, 1924, he had paid Rs. 6,500. The defendant was let into possession of the lands as from the 1st July, 1921, *i.e.*, the commencement of fasli 1331, and continued in uninterrupted possession until, as a result of proceedings taken by him in 1924, under S. 145 of the Criminal Procedure Code, a receiver was appointed to harvest the crops and realise the sale proceeds. What had happened was that the Zamindar, alleging a voluntary surrender by the defendant in May, 1924, had leased the lands afresh to the 2nd to 4th plaintiffs. In view of the situation thus created, the Zamindar and his new tenants filed the present suit praying for either a permanent injunction restraining the defendants from interfering with the plaintiffs' possession or, if it should be found that the defendants were in possession, for delivery; and further for a declaration that the plaintiffs were entitled to

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the sum of Rs. 5,600 deposited in Court by the receiver appointed in the possession proceedings. It was alleged in the plaint that the defendant's lease was only for one year. There were further allegations that the defendant, while in occupation of the land, had caused damage amounting to Rs. 4,000 to trees and to a tank, and that, to compound for his liability he had, as already stated, voluntarily surrendered the lease in May, 1924. It was added that he was understood to be setting up a seven years' lease, and that even if true the lease was invalid, the document which purported to create it being unregistered. The defendant, in his written statement, traversed the allegations of fact in the plaint and maintained that the lease was for seven years, and was valid.

The findings at the trial were in the first place that so far from the plaintiff succeeding in establishing a lease for one year there was overwhelming evidence that it was false, and that, subject to the question of its validity, the lease was for a term of seven years. The allegations of damage and of consequent surrender were also discredited. On the question of the validity of the lease, however, and the further question of the effect of part performance, the learned Additional Subordinate Judge found for the plaintiff, and accordingly decreed possession. This decision is attacked by the defendant in A. S. No. 59 of 1927. In A. S. No. 157 of 1927 the plaintiff claims the sum realised by the receiver, a question which will only arise if the decision of the trial Court upon the main point is confirmed.

Dealing then with A. S. No. 59, we may note, to begin with, that the whole story of a year's lease, of the defendant's acts of waste and damage, and of a voluntary surrender, has been here abandoned. We are now concerned only with the question whether the steps taken by auction and otherwise to let the property for seven years resulted in a valid lease. The law applicable to the case is clear. If the lease had fallen within the Transfer of Property Act it could only have been made, as S. 107 provides, by a registered instrument. But it was an agricultural lease, and such leases are excluded by S. 117. It could therefore have been made either orally or in writing, though if in writing S. 17 of the Registration Act requires that it should have been registered. Admittedly there is no registered lease or agreement to lease. For the lease to be

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valid, then, it must be found that it originated in an oral contract.

The case for the appellant is that such an oral contract is to be found in the auction proceedings, terminating with the acceptance by the Dewan, on behalf of the Zamindar, of his bid of Rs. 9,000. If any written documents came into existence subsequently, he contends, they did not embody the contract, which was already completed. *Per contra*, the learned Advocate-General for the respondent has endeavoured to show that there was an intention common to the parties that a lease deed should be executed, and that this intention was fulfilled.

No attempt has been made to dispute the position that, if no proof is forthcoming that the parties committed the lease to writing, a completed oral contract of lease resulted from the acceptance by the selling officer of the defendant's bid. If authority be needed for this proposition it is to be found in the Privy Council case *Sheo Lall Bohra* v. *Sheik Mahomed*[1] where some lands were sold by Government, and their Lordships held that "in the sale the Government was exactly in the situation of an individual selling his property by auction; and when the property was knocked down, the relation of vendor and vendee existed between the Government and the highest bidder". So far as the sale of goods is concerned, this principle has been embodied in S. 64 of Act III of 1930. A case bearing some resemblance to the present one is *Chitibobu Adenna* v. *Garimalla Jaggarayadu*[2]. The Vizianagaram Samasthanam sold the occupancy rights in a jeroyiti land by auction to the defendants, and subsequently granted a cowle to the plaintiff, who sued in ejectment. It was held that the defendants' title was complete as soon as the land was knocked down, and the contention that it could only be completed by an exchange of patta and muchilika was repelled.

The requirements of an oral lease being thus satisfied, we have then to see whether what would otherwise stand as such a lease has been replaced by some document which may be construed, so far as its terms are concerned, as a lease in writing, and which would therefore render oral proof of the terms of the lease inadmissible under S. 91 of the Evidence Act, and would in its turn, being unregistered, fail to effect the contract

1. (1869) 13 W. R. 4 (P. C.). 2. (1913) 28 M. L. J. 617.

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or to be admissible in evidence of it, under S. 49 of the Registration Act. The learned Advocate-General offers three such documents, either alternatively or in combination, as fulfilling this requirement. They are (*a*) the auction list, (*b*) a muchilika which the defendant is said to have signed on the day after the auction, and (*c*) an agreement, dated the 15th June, 1921, but not signed by the Dewan until the 29th July. Only the last of these documents has been produced by the defendant (Exhibit XXI). There is even some doubt whether document (*b*) came into existence at all; but assuming that it did, both it and the auction list have been withheld by the plaintiff and since no explanation has been offered in justification of this conduct we can only conclude that they have been suppressed because they would have fatally exposed the falsity of the case originally set up. In their absence the plaintiff has sought to establish their contents by secondary evidence, largely in the shape of admissions extracted from the defendant. It seems to us in the highest degree improper that such a method of proof should be allowed. The point has not been fully argued, but we can find no justification for such a course in S. 65 of the Evidence Act, and upon general principles a party ought not to be allowed to defeat his opponent by force of a document which he has in his possession and will not produce. The learned Advocate-General has sought to draw a distinction between the secondary evidence of the contents of a document and oral evidence to the effect that the bargain between the parties was committed to writing, and contends that he is entitled to use the latter kind of evidence and that it is enough for his purpose. Whatever may be the merits of this distinction, we are clear that that evidence is not enough for his purpose, and that unless we can ascertain with some close approach to accuracy and completeness what the two missing documents contain we cannot safely conclude that either, or both together, amounts to a lease deed. To take first the auction list, the defendant admits that he signed it. In one place he says that it contained all the terms to be found in Exhibit XXI and that he signed no other document. Later on he speaks of signing a muchilika on the day after the auction, and that, he says, was the document in which all the terms of the lease were embodied. "I thought that that muchilika was to be the sole record of the lease." From two of his witnesses, D. Ws. 3 and 4, was extracted the

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statement that the defendant signed a muchilika containing the terms of the lease. We are not prepared to act upon these statements, couched as they are in the most general terms, in the circumstances of the case. It is unnecessary to cite examples from the case-law upon the subject in illustration of the difficulty which Courts have sometimes felt in deciding, often after finding it necessary to make a close scrutiny of its terms, whether a given document, in the language of the Privy Council in *Subramonian* v. *Lutchman*[1], constitutes the bargain between the parties, or is merely the record of an already completed transaction. It is not even necessarily enough that the document should contain a complete recital of the terms, which is the most that can be derived from the statements of the witnesses. It may well be that, if these documents were examined, we should be led to the conclusion that the completion of the auction, and not they or one of them, marked the completion of the contract. See, for example, *Narain Coomary* v. *Ramkrishna Dass*[2] for an instance of this kind. The defendant is entitled to ask us to make every presumption in his favour, both because the objection taken is a technical one, not affecting the substantial justice of the case, and in view of the plaintiffs' conduct in suppressing these documents. We attach no importance to the argument that it is improbable that the parties should not have had a written instrument in contemplation, in face of the defendant's assertion that the Dewan assured him that registration was unnecessary since he held the Zamindar's power of attorney. We are accordingly unable to find that the oral lease which was constituted by the acceptance of the defendant's bid was embodied either in the auction list or in the muchilika.

There remains the document, Exhibit XXI, signed by the Dewan. This is styled an agreement, and opens with the recital "You have settled the fixed lease (or rent) . . . . . . at Rs. 9,000." It goes on to define some of the terms upon which the defendant is to hold the land. It may be that, if internal evidence alone were in question, it could be read as a lease-deed. But it was not signed by the Dewan until some four and a half months had elapsed since the auction, and by then the defendant had not only been for nearly a month in possession of the

1. (1922) L. R. 50 I.A. 77: I. L. R. 50 Cal. 338: 44 M. L J. 602 (P.C.).
2. (1880) I. L. R. 5 Cal. 864.

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land but had also made a number of payments (*see* Exhibits IX to XII) as lessee. Further, the argument dealt with above that the lease had already been constituted by the earlier documents leaves little or no room for the contention that this is the instrument which created it.

We are accordingly unable to agree with the Lower Court that the lease is invalid under S. 49 of the Registration Act because it was a lease in writing. This finding is sufficient to dispose of the case, and the defendant has no need to resort to the doctrine of part performance, upon which some argument was addressed to us. We allow Appeal No. 59 and dismiss the plaintiffs' suit, with costs throughout. Appeal No. 157 by the plaintiffs is dismissed with costs of the 1st respondent.

B. V. V. *Appeal allowed.*
Cross-appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Ponnu Chettiar .. *Appellant** (*Petitioner*)

v.

Sambasiva Aiyar and another .. *Respondents* (*Respondents*).

Ponnu Chettiar *v.* Sambasiva Aiyar.

Mortgage—Suit on simple mortgage—Appointment of receiver—Sale of some properties in execution of prior money decree—Right of purchaser as regards income realised by receiver—English cases—Reference in mortgage suits.

The appellant obtained a money decree and in execution of that decree attached certain properties belonging to the judgment-debtor. Subsequently the respondent sued to enforce a simple mortgage executed by the judgment-debtor in his favour and in that suit obtained the appointment of a receiver over the mortgaged properties which included those already attached. Thereupon the appellant applied in the mortgage suit for leave to execute his decree against the receiver Not only was that request complied with but leave was also granted to him to implead the receiver as party to the execution proceedings. Thereafter in execution of the money decree the attached properties were put up for sale and purchased by the appellant. After the sale was confirmed he attempted to take possession but the respondent objected and the High Court eventually negatived the appellant's right to possession. Later on the respondent obtained a mortgage decree, brought the properties to sale and some third party purchased them. Till the date of the sale the receiver had realised a certain amount as income from the properties and paid the amount into Court. The appellant applied for payment out to him of that part of the amount paid by the receiver into Court attributable to the properties previously purchased by him. When he made this application the sale in favour of the third party had not been confirmed and the receiver's appointment was still in force.

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* A. A. O. No. 445 of 1928. 5th August, 1932.

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Held, that the effect of the order appointing the receiver was to deprive the mortgagor of his right to deal with the income and the appellant, who stood in no better position than the mortgagor, was not entitled to the income as claimed by him.

Per *Reilly, J.*—It is a very dangerous thing to quote English decisions in mortgage suits in India without the very greatest care.

Appeal against the order of the Court of the Subordinate Judge of Mayavaram, dated 21st September, 1928 and made in E. A. No. 220 of 1928 in O. S. No. 55 of 1924.

K. V. Sesha Aiyangar for appellant.

K. Bhashyam Aiyangar and *R. Viswanathan* for respondents.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—This appeal raises a question as regards the effect of the appointment of a receiver in a suit to enforce a simple mortgage. The appellant obtained a money decree against one Ganapathia Pillai in O. S. No. 78 of 1923 (District Munsif's Court, Mayavaram) and in execution of that decree attached certain properties. To enforce a mortgage executed by the aforesaid Ganapathia Pillai, the respondent filed O. S. No. 55 of 1924 (Mayavaram Sub-Court) and obtained an appointment of receiver over the mortgaged properties, which included those already attached. Thereupon, the appellant applied in the mortgage suit for leave to execute his decree against the receiver. Not only was that request complied with, but leave was also granted to him to implead the receiver as a party to the execution proceedings. Thereafter, in execution of the money decree, the attached properties were put up for sale and purchased by the decree-holder himself, that is, the appellant. The sale was in due course confirmed. The appellant attempted to take possession and the respondents then made several applications to the Court, one being to restrain the appellant from taking possession; the second, to implead him as a party to their mortgage suit and the third, to continue the receiver as against him, after so making him a party. All the applications were granted. The appellant took the matters to the High Court but without success. Pausing here for a moment, the effect of the High Court's order was to negative the appellant's right to possession. The rest of the story may be briefly told. The respondents obtained in their suit a mortgage decree, brought the mortgaged properties to sale, and some third party purchased them. Till the date of this sale, the receiver had realised a

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certain amount as income from the properties and paid the amount into Court. As I have said, some of these properties the appellant had previously purchased. He applied to the Lower Court for payment out to him of that part of the amount paid by the receiver into Court, attributable to the properties purchased by him, on the ground that the ownership of the income is incidental to the ownership of the property. When he made this application, the sale in favour of the third party referred to above had not been confirmed and the receiver's appointment was still in force. The Lower Court having rejected his application, he has filed the present appeal.

A preliminary point has been taken that no appeal lies. This objection cannot, in our opinion, prevail. The appellant was, as I shall show, impleaded as a party to the mortgage suit. The question of substance is, to whom does the fund in Court belong, to the respondents or to the appellant? If the appellant were a stranger, it would have been open to him to assert his title to the money by a claim proceeding under *O. 21, R. 58*, but he having been a party, the question would be one under *S. 47, Civil Procedure Code* and the preliminary objection must on that ground be overruled.

Now coming to the merits, on the facts that I have stated, the point to be decided lies in a very small compass. What was the state of affairs on the date the appellant purchased the properties? The effect of the order appointing the receiver was to deprive the mortgagor of his right to deal with the income. It was in order to safeguard the respondent's position that the receiver was appointed. The mortgagor could not defeat the order by assigning the profits to a third party. Could he have, for instance, by private transfer, assigned the income to the appellant? Of course not. What the appellant purchased was no more than the right, title and interest of the mortgagor. But the latter himself had no right to dispose of the income. The order operated to take away that right, which, otherwise, he would have possessed.

"The order appointing a receiver operates as an injunction to restrain the judgment-debtor from himself receiving the moneys over which the receiver is appointed."

See In re *Marquis of Anglesey*[1].

1. (1903) 2 Ch. 727.

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It is then obvious that no private transferee from him could have acquired a valid right to the income and it follows that the appellant who was a purchaser of his right at a Court sale stands in no better position.

Mr. Sesha Aiyangar, for the appellant, contends that as his purchase was with the Court's leave, it vested in his client a right over the income. This argument seems to me utterly untenable. It is well established that without an application for such relief, no person can proceed against a receiver. The appellant therefore chose the only course open to him: that of obtaining the previous permission of the Court which made the appointment. Had he not obtained such permission, he would have been guilty of contempt and I fail to see how the Court's order, allowing execution against the receiver, could be said to have invested the appellant with any special rights.

The question was raised in the course of the argument, in what circumstances would a Court in India be justified in granting a receiver in a simple mortgage suit? This is not relevant to the point we have to decide and I shall refrain from expressing any opinion upon it; but I may point out, that the notion is utterly wrong, that in England those mortgagees only as are entitled to immediate possession obtain an appointment of receiver. This idea seems to underlie some of the decisions cited before us and with great respect, is the very reverse of the truth. A mortgage in England may be either *legal* or *equitable*, and, before the passing of the Judicature Acts, the general right of a legal mortgagee was to take possession and not to come for a receiver. When he had the legal right to enter into possession, why should he be granted the equitable relief? The English Courts therefore held that the appointment of a receiver at the instance of a legal mortgagee was not a matter of course; whereas in the case of an equitable mortgagee, this right was specially conferred on him, *on the ground that he had no means of taking possession.* (Kerr on Receivers, 9th Edition, pages 32 to 35.) This, of course, is not the law to-day. Under the present practice, receivers are as freely appointed at the instance of legal mortgagees as in cases in which the mortgagees have only an equitable interest. (*See* Kerr on Receivers, page 37 and Fisher on Mortgages, 7th Edition, page 359.) I am referring to this subject only to correct the misapprehension to which I have adverted. I may also

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draw attention to another fact, namely, that the term "equitable mortgage" in the English law is of much wider import than under the Transfer of Property Act. This fact is sometimes overlooked and confusion has arisen. An equitable mortgage might be of several kinds and one of them was by deposit of title deeds. (Halsbury's *Laws of England*, Vol. XXI, p. 74.) To the last mentioned sub-division alone, the term is by common usage applied in India. The question often arose in England, in what cases a receiver would be granted at the instance of a subsequent encumbrancer (an equitable mortgagee in the eye of the law) as against the first encumbrancer (the legal mortgagee). (*See* Kerr on Receivers, pages 32 to 34.) With that question we are not directly concerned, but the law in England seems to be, that the prior encumbrancer is not entitled to rents received by the receiver previous to his giving notice that he claims them as against the receiver. Ordinarily, an order appointing a receiver preserves the rights of prior encumbrancers, but if it does not, a first mortgagee is not entitled to rents collected by a receiver previous to the former's application to take possession. (*See* Fisher, p. 374; Kerr, pp. 36 to 38 and 193 and 194.) As I have said, we are not here concerned in what cases a Court in India will appoint a receiver, but when an appointment is made, the English Courts have held the receiver's rights to rents already collected prevails even as against a prior encumbrancer, a person with paramount rights. As authority for this proposition I may further refer to In re *Metropolitan Amalgamated Estates*[1]. The principle of the rule is this: though a mortgagee under his mortgage is entitled to possession, it is of the nature of the transaction that till he demands possession or enters into receipt of the rents and profits, the mortgagor should remain in possession and such possession is rightful. (Halsbury's *Laws of England*, Vol. XXI, p. 157.)

It has been urged that a Court in India will not appoint a receiver unless the mortgagee makes out that he has eventually a right to a personal decree against the mortgagor. With this subject, again, we are not here concerned, but it may be pointed out that, in this case, a personal decree was eventually passed and that it has not even now been fully satisfied.

1. (1912) 2 Ch. 497.

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Mr. Sesha Aiyangar next relies upon certain cases, such as In re *Dickinson*[1], In re *Potts*[2] and In re *Pearce*[3] and argues that the fund in question belongs to his client, as the effect of the order appointing the receiver is not to create a lien in favour of the mortgagees. But what he overlooks is, that these cases deal with special provisions of the Bankruptcy Act. Under the Statute, the property of the debtor vests in the receiver and the execution is made in favour of secured creditors. The discussion turned upon, who were secured creditors. As Lord Esher, M. R., points out in In re *Potts*[2]:

"The Bankruptcy Law is not the Common Law of England; it is an enacted law and all the rights under it are determined by statute and by nothing else."

In view of these cases, it is doubtful whether the decision of Madhavan Nair, J., in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[4] is correct or not, for the claimant, whose right was negatived by the learned Judge, was the Official Assignee; but with that I am not concerned.

In re *Marquis of Anglesey*[5], already cited, on which Mr. Bhashyam Aiyangar, for the respondents, relies, is more in point. It decides that a receivership order obtained by a judgment-creditor over a judgment-debtor's share of an estate prevents the latter from dealing with it to the prejudice of the former and it also prevents any subsequent mortgagee or judgment-creditor from gaining priority by means of a stop order or charging order.

In the result, the appeal is dismissed with costs.

Reilly, J.

Reilly, J.—I agree. As my learned brother has pointed out, the arguments in this case, which has occupied us a considerable time, have ranged over a much wider field than was really necessary. It was urged for the plaintiff-mortgagees that by reason of the order appointing a receiver, which they obtained in the course of their suit on simple mortgages, they got a special right to have their mortgage debts satisfied out of the income of the mortgaged property, which might be collected by the receiver, and that the receiver must be treated as a receiver appointed for their benefit alone. That was contended

1. (1889) 22 Q. B. D. 187.
2. (1893) 1 Q. B. 648.
3. (1919) 1 K. B. 354.
4. (1931) I. L. R. 54 Mad. 565: 61 M. L. J. 111.
5. (1903) 2 Ch. 727.

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on the strength of various English decisions. Mr. Bhashyam Aiyangar for the plaintiffs states that he also relies upon *Rameshwar Singh* v. *Chuni Lal Shaha*[1]. In that case the learned Judges, dealing with a simple mortgage, certainly went all the way necessary to support Mr. Bhashyam Aiyangar's contention. They said:

"Our attention has been invited to the case of *Penny* v. *Todd*[2], where it was ruled that the possession of a receiver in a mortgage suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the receiver who was appointed at the instance of the first mortgagee holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion, this contention is clearly well founded."

That statement of opinion was adopted by Madhavan Nair, J., in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[3] and applied to a mortgage by deposit of title deeds. We are not here concerned with a mortgage by deposit of title deeds or any of the incidents of such a mortgage. I venture to say with the very greatest respect that in regard to a simple mortgage the statement adopted by the learned Judges of the Calcutta High Court as the law of this country appears to me to be anything but well founded. Certainly it was not a safe proposition to base upon a statement in the indirect report of *Penny* v. *Todd*[2], where Vice-Chancellor Mallins is represented as having made a remark of a general nature in regard to receivers appointed at the instance of equitable mortgagees in England. The interest of *Penny* v. *Todd*[2], really consists, not so much in that general remark of the learned Vice-Chancellor, as in the qualifications of the general remark of which that case is an instance. But, if I may say so, it appears to me a very dangerous thing to quote English decisions in mortgage cases in this country without the very greatest care. There are many great differences between the law of mortgages in this country and the law of mortgages in England, which is a very difficult and complicated subject. If we use English decisions on mortgage questions without the very greatest care, they are far more likely to befog us than enlighten us. Indeed indiscriminate citing of English decisions in mortgage cases in the Courts of this country appears to me one of the surest roads to confusion. And to say that it has been decided in a certain case

1. (1919) I. L. R. 47 Cal. 418. 2. (1878) 26 W. R. (Eng.) 502.
3. (1931) I. L. R. 54 Mad. 565: 61 M. L. J. 111.

in England that a mortgagee has a certain right and therefore a simple mortgagee in this country has a similar right is a very obvious instance of *non sequitur*. When we are dealing with the results of appointing a receiver in a mortgage suit in this country on a simple mortgage, there are many distinctions between the law of this country and the law of England which it is profitable to remember. A legal mortgagee in England has always had the right to get possession on the mortgagor's default, unless by some special provision that is excepted; a mortgagee by deed in England before the Law of Property Act of 1925 had a right himself to appoint a receiver, and that right has been re-stated in the Law of Property Act; an equitable mortgagee in England who applies for the appointment of a receiver, if interest has fallen into arrears, can get an appointment almost of course, and he can also realise the mortgage-debt due to him in certain circumstances by getting a receiver appointed as an ordinary remedy; a mortgagee in England can pursue all his remedies at once. None of those statements applies to a simple mortgagee in this country. In this country there is no doubt that a simple mortgagee, who has brought a suit to enforce his mortgage, can in special circumstances get a receiver appointed, for instance, if the mortgagor by his act or default is destroying the mortgage security or allowing it to be destroyed. But the appointment of a receiver has to be justified by special circumstances. It is not one of the ordinary remedies of a simple mortgagee. Mr. Sesha Aiyangar for defendant 9, the appellant before us, has suggested that in this country on the application of a simple mortgagee a receiver should never be appointed unless the mortgagee has still a personal remedy on his debt against his mortgagor. Speaking for myself I think there is a good deal to be said for that contention, if we include in "personal remedy" the remedies provided by Ss. 65, 66 and 68 of the Transfer of Property Act. However, it is unnecessary to express any decided opinion on that question in this case. But I do not think there is any reason to doubt that a simple mortgagee in this country cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties, who have already acquired rights in the equity of redemption. Nor do I see any reason to doubt that a receiver appointed in such a case in this

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country is, like a receiver appointed in other cases, appointed for the protection of the property for the benefit of all the parties to the suit in accordance with their respective rights, as they may eventually be established.

But in this case Mr. Sesha Aiyangar has to go a great deal farther than that before he can succeed. A receiver has been appointed in this suit, to which Ponnu Chetty, Mr. Sesha Aiyangar's client, was made a party as defendant 9. The receiver was originally appointed before defendant 9 was brought into the suit; but his appointment was continued after defendant 9 was impleaded, and the appeal against that order has been dismissed. After the appointment of the receiver I do not think there can be the least doubt that the mortgagor as a person bound by that order had no right to do anything to destroy the effect of that order. The receiver had the right and the duty to collect the income of the property. The mortgagor was bound by that order and could not collect or enjoy the income of the property. What was suggested at one stage by Mr. Sesha Aiyangar was that, although the mortgagor could not collect or enjoy the income of the property himself, he could nullify the order appointing the receiver by transferring some right in him to some other person. That appears to me to be in itself an extraordinary proposition. No doubt the order appointing the receiver did not destroy such rights as the mortgagor had in the property. No doubt he could still sell some interest in the equity of redemption to a third party. But, as he had been prohibited by the appointment of the receiver from enjoying or collecting the income of the property, how could he transfer any immediate right to enjoy or collect it to a third party? Even apart from the decisions which my learned brother has quoted, showing that it is well recognised in England that a judgment-debtor cannot deal with property for which a receiver has been appointed so as to defeat the order appointing the receiver or prejudice a judgment-creditor at whose instance the order has been obtained, on principle how can the position be otherwise?

But in the end Mr. Sesha Aiyangar, as I understand him, does not go quite so far as to say that after the appointment of the receiver, the mortgagor could at once turn round and defeat that order by himself selling his equity of redemption to a third party. What he contends more reasonably is that with the

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consent of the Court that could be done even after the appointment of the receiver. What happened in this case was, not that the mortgagor directly sold to defendant 9, but that defendant 9, who had a money decree against the mortgagor, bought the equity of redemption in execution of his decree. The fact that he was a Court-auction-purchaser instead of a private purchaser does not justify any contention that the consent of the Court to the transfer of the right to the income may be implied in the Court auction or in any of the proceedings in connection with it. It happens that in this case the auction in which defendant 9 bought was in the same Court in which the mortgagee's suit was pending. The same Court appointed the receiver and conducted the Court auction in which defendant 9 bought such interest as he could buy from the mortgagor. The receiver was quite properly brought on record in the proceedings in execution of defendant 9's decree. Mr. Sesha Aiyangar suggests that we must take it that the Subordinate Judge consented to defendant 9 buying in the Court-auction the whole of the equity of redemption, including the right to possession and the right to collect the income of the property from the date of his purchase. Now why should we infer anything of the sort? Oddly enough the receiver, who was a vakil of the Subordinate Judge's Court, raised no objection to the auction sale and did not assist the Court by putting forward any contention, but merely said, as the record shows, that he left the matter to the Court. I think it would have been better if he had tried to be of more assistance to the Court. But how can we reasonably suppose that the Subordinate Judge consented to such a sale as would nullify and defeat the order appointing a receiver, which he had himself made and which was still in force in his Court? When he decided that defendant 9 was entitled to bring some interest of the mortgagor to sale in execution, that does not imply that he decided that what could be brought to sale was the equity of redemption including the right to possession and the right to the income. There was undoubtedly a right in the mortgagor, which could be sold without interfering in any way with the effect of the order appointing the receiver and which might, in certain circumstances, if the mortgage debt had been cleared off, have turned out to be a very valuable right. Subject to the mortgage and to any decree or order in the suit upon it the

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equity of redemption was put up for sale. The Subordinate Judge allowed that to be done; but I see no reason whatever to say that in so doing he gave any implicit permission to sell anything more than what the mortgagor but for defendant 9's attachment in execution could have transferred at that time. Without the consent of the Court after the appointment of the receiver the mortgagor obviously could not have collected the income of the property; he could not have transferred the right to collect the income of the property; and defendant 9 could not have bought anything which the mortgagor could not have sold. Accepting for the purpose of this case Mr. Sesha Aiyangar's suggestion that the fund collected by the receiver from the mortgaged property is not in any way charged or earmarked for the benefit of the mortgagee in the first instance, we have to remember that these proceedings arise out of the application of defendant 9 to withdraw part of that fund on the ground that it represents the income from the date of his purchase. It is not necessary to decide in this case whether the plaintiffs would eventually have a right to draw that money. But it is clear, I think, that defendant 9 had no basis for his claim upon the fund at the time he made it, *i.e.*, while the receiver's appointment was still in force. Mr. Sesha Aiyangar contends that under S. 8 of the Transfer of Property Act the income belongs to defendant 9 from the date of his purchase. So it would, if his vendor had a right to transfer it to him. But in the circumstances it is impossible, as my learned brother has pointed out, to say that he had that right while he was under the prohibition of the order appointing the receiver. The decision of the learned Subordinate Judge was therefore correct, and this appeal should be dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

V. G. Nataraja Mudaliar .. *Appellant** (*Petitioner-Defendant*)

v.

Official Assignee of Madras .. *Respondent* (*Counter-Petitioner-Plaintiff*).

Nataraja Mudaliar v. Official Assignee of Madras.

Limitation Act (IX of 1908), Art. 182 (5)—Batta application—Step-in-aid in execution—R. 187 of Civil Rules of Practice.

*C. M. S. A. No. 135 of 1929. 2nd February, 1933.

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On the question whether in a case where execution petition filed on 24th June, 1927 was barred by limitation, the previous application having been dated 23rd February, 1924,

Held, that the batta paid on 2nd July, 1924 for issue of sale warrant of the property saved limitation.

Under R. 187 of the Civil Rules of Practice the batta for the sale warrant has to be paid a week before and a warrant cannot be prepared till the batta is paid. If the batta is not paid, the execution petition is liable to be dismissed. The entry "Sale warrant" under the heading "Particulars of the process" and of "Immovable property" under that of "Against whom" in the batta memo is sufficient to indicate that the Court was asked to issue a sale warrant the batta being paid for it. This is a step-in-aid of execution.

Vijiaraghavalu Naidu v. *Srinivasalu Naidu*, (1905) I.L.R. 28 Mad. 399; *Arunachalam Chettiar* v. *Latchumanan Chettiar*, (1924) 47 M. L. J. 537; *Raman Chetty* v. *Ramaswami Pillai*, (1928) 56 M. L. J. 64 and *Govindaswami Pillai* v. *Govinda Padayachi*, (1925) 48 M. L. J. 678, considered.

Appeal against the order of the Court of the Subordinate Judge of Vellore, dated the 8th day of October, 1928 and made in A. S. No. 60 of 1928 (A. S. No. 66 of 1928 on the file of the District Court of North Arcot) preferred against the order of the Court of the District Munsif of Vellore, dated the 25th day of February, 1928 and made in M. P. No. 87 of 1928 in E. P. No. 863 of 1927 in O. S. No. 217 of 1928.

V. Narayanasami Aiyar and *V. Subramania Aiyar* for appellant.

N. Sivaramakrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT.—The question in this case is whether the execution petition which was filed on 24th June, 1927, is barred by limitation. The previous application was on 23rd February, 1924. To save limitation the decree-holder relies upon the batta paid on 2nd July, 1924, for the auction sale of the property. The question is whether the payment of batta is a step-in-aid of execution. Both the Courts have held in favour of the decree-holder and against that decision this second appeal is filed.

The following is an extract of the batta memo:—Further memo filed on behalf of the plaintiff.

Particulars of the process.	Against whom.	Residence.	Batta.	Remarks.
Sale warrant.	Immovable property.	Dt. Munsif's Court, Vellore.	Rs. A. P. 1 0 0	

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There appear to have been four cases in this High Court as regards payment of batta saving limitation. The first is the Bench case in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1], where it was held that a step-in-aid had been taken. The second is *Arunachalam Chettiar* v. *Latchumanan Chettiar*[2], where Wallace, J., held that the payment of process fee for the issue of a warrant of arrest in execution of a decree where the batta memo itself does not apply for the issue of process is not a step-in-aid of execution so as to save limitation. As observed by Jackson, J., in *Raman Chetty* v. *Ramaswami Pillai*[3] (the third case) the actual paper is not quoted in the judgment nor was it found in the record. In *Arunachalam Chettiar* v. *Latchumanan Chettiar*[2] Wallace, J., relied on *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1] as indicating the then view of this Court that a mere payment of batta for process where the batta memo itself does not apply for the issue of process will not be a step-in-aid. In that case, *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1], a batta memorandum was held to be a step-in-aid and the judgment says that it asked that process may issue and for this purpose the necessary batta was deposited. Jackson, J., says in *Raman Chetty* v. *Ramaswami Pillai*[3] that he does not think it can be gathered from that judgment that it was a distinct application for process over and above what was in the form. In *Govindaswami Pillai* v. *Govinda Padayachi*[4] Madhavan Nair, J., held that the "process application" for which batta was paid "to attach the properties in the house of the defendants" and which stated "that one rupee might be received for the purpose," was a step-in-aid. Thus there are one Bench case and three single Judge decisions. Of these *Govindaswami Pillai* v. *Govinda Padayachi*[4], where attachment was distinctly asked for, is not of much help. Of the other two decisions by single Judges both consider themselves in agreement with the Bench case, *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1]. But as observed in *Raman Chetty* v. *Ramaswami Pillai*[3] by Jackson, J., in *Arunachalam Chettiar* v. *Latchumanan Chettiar*[2] the actual words in the batta memorandum are not set out. Jackson, J., says that

"it is difficult to apply rulings which contain no citation of the document in question. In fact for that reason alone I should be prepared to ignore the case-law and trust to the plain interpretation of the statute."

1. (1905) I. L. R. 28 Mad. 399.
2. (1924) 47 M. L. J. 537.
3. (1928) 56 M. L. J. 64.
4. (1925) 48 M. L. J. 678.

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He continues:

"I had thought of referring the matter to a Bench, but on a consideration of the cases I hold that *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1] is clear authority (cf. *Alagamuthu Pillai* v. *Devasagaya Fernandes*[2]) which is not cited in *Arunachalam Chettiar* v. *Latchumanan Chettiar*[3]."

I cannot help thinking that the brackets in the report are misplaced because *Vijiaraghavalu Naidu* v. *Srinivasulu Naidu*[1] is referred to twice in *Arunachalam Chettiar* v. *Latchumanan Chettiar*[3] and in fact in the previous paragraph, Jackson, J., says that the learned Judge in that case considered *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*[1]. *Alagamuthu Pillai* v. *Devasagaya Fernandes*[2], which is not cited in *Arunachalam Chettiar* v. *Latchumanan Chettiar*[3], is such a clear case as not to be of much help. In the present case the Court passed an order on 31st January, 1924, that the properties should be sold on 7th July, 1924, and on 2nd July, 1924, the process fee was paid for issue of a sale warrant. Under R. 187 of the Civil Rules of Practice the batta for the sale warrant has to be paid a week before and a warrant cannot be prepared till the batta is paid. If the batta is not paid the Execution Petition is liable to be dismissed. It seems to me that the entry "Sale warrant" under "Particulars of process" and "Immovable property" under "Against whom" is sufficient to indicate that the Court was asked to issue a sale warrant the batta being paid for it. I therefore agree with the view of both the Lower Courts that this is a step-in-aid of execution. The second appeal fails and is dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Mahapatro v. Magata Patro.

Jujisti Mahapatro .. *Appellant** (*Transferee Decree-holder and Petitioner*)

v.

Korada Magata Patro and others .. *Respondents* (*Original Decree-holders and Respondents-Defendants Nos. 2 to 5, 7 to 16, 18 and 20 to 22*).

Limitation Act (IX of 1908), Art. 181—Mortgage suit—Preliminary decree—Appeal therefrom withdrawn and dismissed—Final decree—Appli-

* Appeal No. 286 of 1930. 8th November, 1932.

1. (1905) I. L. R. 28 Mad. 399. 2. (1915) 3 L. W. 34.
3. (1924) 47 M. L. J. 537.

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cation for—Limitation—Starting point of—Order dismissing appeal, if a decree—Civil Procedure Code (V of 1908), S. 2 (2).

An order dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit and can in no sense be regarded as an order adopting or confirming the decision appealed from. Time for applying for final decree in a mortgage suit would in such a case run from the date fixed for payment in the preliminary decree. But where the appeal is formally brought before the Court but is withdrawn and dismissed, the order dismissing the appeal amounts to a decree which supersedes the original order appealed against and time for applying for final decree would run only from the date of the appellate order and not from the date fixed for payment in the preliminary decree.

Abdul Majid v. *Jawahir Lal*, (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P.C.); *Batuk Nath* v. *Munni Dei*, (1914) L. R. 41, I. A. 104: I.L.R. 36 All. 284: 27 M. L. J. 1 (P. C.) and *Sachindranath Roy* v. *Maharaj Bahadur Singh*, (1921) L. R. 48 I. A. 335: I.L.R. 49 Cal. 203 (P. C.), distinguished.

Peria Kovil Ramanuja Peria Jeeyangar v. *Lakshmi Doss*, (1906) I.L.R. 30 Mad. 1: 16 M.L.J 393 (F.B.); *Venkayya* v. *Sathiraju*, (1921) I. L. R. 44 Mad. 714: 41 M.L.J. 117 and *Sahu Nandlal Saran* v. *Sahu Dharam Kirti Saran*, (1925) 24 A.L.J. 465, relied on.

Raghu Prasad Singh v. *Jadunandan Prasad*, (1920) 6 Pat. L. J. 27 and *Gohur Bepari* v. *Ramkrishna Shaha*, (1927) 46 Cal. L. J. 111, referred to.

Appeal against the orders of the District Court of Ganjam, dated the 9th day of March, 1928 and made in I. A. No. 22 of 1928 and I. A. No. 36 of 1927 in O. S. No. 7 of 1918, respectively.

B. Jagannadha Doss for *S. A. Seshadri Aiyangar* for appellant.

C. Sambasiva Rao for respondents.

The Court delivered the following

Madhavan Nair, J.

JUDGMENT. *Madhavan Nair, J.*—I have had the advantage of reading the judgment which my learned brother is going to deliver and I agree with him. As the question involved in the appeal is of some importance, I will briefly record my reasons in support of my conclusion.

This appeal arises out of an application filed by the transferee decree-holder for passing a final decree in a mortgage suit. The facts of this case are not disputed. In O.S. No. 7 of 1918 on the file of the District Court of Ganjam, which was a suit on a mortgage, a preliminary decree for sale was passed on 12th December, 1921, fixing six months for the payment of the decree amount. An appeal against the decree was filed in the High Court—Appeal No. 259 of 1923—by the 5th judgment-debtor. Notice was ordered in the appeal, and some of the respondents were served. At this stage the appeal itself was withdrawn by the appellant and it was dismissed with the costs

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of those respondents that appeared. The order passed by the High Court runs thus:

"The appeal is withdrawn. It is dismissed with costs. The costs will be proportionate . . ."

This order was passed on 21st January, 1924. On 21st January, 1927, the transferee decree-holder presented I. A. No. 36 of 1927 in the District Court for a final decree. The question that arises for decision is whether this petition is in time.

Under Art. 181 of the Limitation Act which is applicable to the case, the period of limitation for applying for a final decree is three years from the time when the right to apply accrues. In the present case, the right to apply accrued on the 12th of June, 1922. The time for filing the application for the final decree expired on the 12th of June, 1925. I.A. No. 36 of 1927 presented on 21st January, 1927, would therefore be clearly barred by time. But the petitioner argues that having regard to the fact that an appeal was filed to the High Court against the judgment and decree in O. S. No. 7 of 1918, that judgment and decree became merged in the final decree of the High Court in Appeal No. 259 of 1923, that limitation runs from 21st January, 1924, the date of the final decree and that since I. A. No. 36 of 1927 was presented on 21st January, 1927, within three years of the High Court's decree, the petition is in time. The respondent argues that since the appeal filed against the preliminary decree was withdrawn and dismissed without consideration of merits, it cannot be said that the original decree has been merged in the appellate decree and that therefore the filing of the appeal cannot be availed of by the petitioner for the purpose of getting a fresh starting point for limitation.

The question for determination is whether in a case where an appeal against a preliminary decree was filed but was withdrawn and dismissed with costs, the time for applying for final decree would run from the date fixed in the preliminary decree for payment or from the date of the order dismissing the appeal. The learned District Judge relying on a decision of the Privy Council in *Abdul Majid* v. *Jawahir Lal*[1] declined to accept the petitioner's contention and held that the application was barred by time. It is argued for the petitioner that the

1. (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P. C.).

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present case does not fall within the scope of the Privy Council decision and that his application is within time as having been filed within three years of the date of the High Court's decree.

In the appeal before the Privy Council which also arose out of an application for a final decree, the facts were as follows:—In a suit to enforce a mortgage a preliminary decree for sale was made by the Subordinate Judge on the 12th of May, 1890. This decree was confirmed by the High Court on the 8th of April, 1893. Against the decree of the High Court an appeal to the Privy Council was admitted; but was dismissed for want of prosecution on the 13th of May, 1901. On the 11th June, 1909, an application was made to the Subordinate Judge "for an order absolute" to sell the mortgaged properties, in other words, "for an order directing enforcement of the order *nisi* which had been confirmed by the decision of the High Court of the 8th of April, 1893". This application was obviously barred under Art. 179 of the Limitation Act of 1877 (which applied to the case) as having been filed after the expiry of three years from the order of the High Court confirming the decree—which was the final order of the appellate Court: but it was argued before the Privy Council that the decree which was sought to be enforced had been "constructively turned" into a decree of the Privy Council by virtue of the dismissal of the appeal on the 13th of May, 1901 and that therefore the period of limitation was twelve years from the 13th May, 1901, under Art. 183 of the Limitation Act of 1877 which corresponds to Art. 180 of the present Limitation Act. This contention was rejected by their Lordships of the Privy Council with the following observations:

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated the 8th of April, 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondent's right is therefore barred by limitation."

The same conclusion was reached by their Lordships of the Privy Council in *Batuk Nath* v. *Munni Dei*[1] which was also

1. (1914) L. R. 41 I. A. 104: I. L. R. 36 All. 284: 27 M. L. J. 1 (P. C.).

a case where the appeal before His Majesty in Council was dismissed as the appellant or his agent had not taken any effective steps for prosecution. The observations of their Lordships quoted above from *Abdul Majid* v. *Jawahir Lal*[1] were quoted by their Lordships in *Sachindra Nath Roy* v. *Maharaj Bahadur Singh*[2]. These observations, says the respondent's learned Counsel, make it clear that in their Lordships' opinion the decree of the Lower Court cannot be considered to have become merged in the decree of the appellate Court unless the appellate Court dealt judicially with the matter in the suit, in other words, heard it on the merits. If this is the basis of the decision of *Abdul Majid* v. *Jawahir Lal*[1] it must follow that the judgment and decree in O. S. No. 7 of 1918 in the present case cannot be said to have become merged in the order of the High Court as that order did not deal with the subject-matter of the appeal on its merits, since the appeal was withdrawn by the appellant. But the appellant seeks to distinguish the decision in *Abdul Majid* v. *Jawahir Lal*[1] on the ground that what was decided in that case was that there was formally no appeal before the Privy Council, that therefore there was no decree of the Privy Council to which Art. 183 of the Limitation Act would apply, and that the same reasoning should not be applied to the present case, inasmuch as there was an appeal formally before the Court and that appeal was finally disposed of by an order of the High Court. According to the appellant's contention where an appeal lay and that appeal was disposed of by an order, that order will amount to a final order in which the original order appealed against gets merged except as in the case dealt with by the Privy Council which was a case of dismissal for default. He would confine the operation of the decision in *Abdul Majid* v. *Jawahir Lal*[1] strictly to cases which have been dismissed for default of prosecution and not to cases like the present one in which the appeal was formally brought before the Court but was withdrawn and dismissed. The question is whether this distinction sought to be drawn by the appellant's Counsel can be maintained.

I find it somewhat difficult to make up my mind on this point but after giving my best consideration, I am inclined to

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1. (1914) I. L. R. 36 All. 350 : 27 M. L. J. 17 (P. C.).
2. (1921) L. R. 48 I. A. 335: I. L. R. 49 C. 203 (P. C.).

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accept the appellant's contention. At first sight it may appear, if I may say so with very great respect, that the reasoning of their Lordships that for a judgment of the Lower Court to become merged in the judgment of the appellate Court, the order of the appellate Court should deal judicially with the matter of the suit would apply equally to cases where an appeal has been dismissed for want of prosecution as well as to cases where as in the one before us the appeal was formally withdrawn and dismissed and an order was drawn up dismissing it with costs. But having regard to the circumstances in which the observations were made, I do not think this is a correct interpretation of their Lordships' judgment. In that case their Lordships decided that the dismissal of an appeal by His Majesty in Council for want of prosecution does not give a fresh starting point of limitation under Art. 179 of the Limitation Act of 1877 and that the limitation ran from the order of the High Court confirming the decree which was the final order of the appellate Court. The observations so strongly relied upon by the respondent that

"the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from,"

were made by their Lordships to meet the argument that the order of the Privy Council must be taken to have constructively turned the decree that was sought to be enforced into a decree of the Privy Council. That was all. Their Lordships' observations do not in any way relate to an order referred to in Cl. (2) of Art. 179 though at first sight it may appear that in their Lordships' view such an order should also be one dealing judicially with the merits of the appeal. But this point—the nature of the final order within the meaning of Cl. (2)—cannot be said to have been inferentially decided as the existence of such an order does not seem to have been an essential part of the argument; for, the real point urged was that there was, what was alleged to be, a decree of the Privy Council and that Art. 180 of the Limitation Act applied to the case; and then, their Lordships pointed out that in the circumstances referred to, the order passed by them dismissing the appeal for want of prosecution cannot be said to be a judicial order. If it is to be understood that in their Lordships' view that the order referred to in Cl. (2) of Art. 179 should also be an order dealing judicially

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with the merits of the appeal, then the decision in *Peria Kovil Ramanuja Peria Jeeyangar* v. *Lakshmi Doss*[1] of this Court may have to be reconsidered. In that case, a second appeal was filed against the lower appellate Court's decree but that was withdrawn and the High Court passed the following order:

"The appellant's vakil having applied for permission to withdraw the appeal, it is ordered that this appeal be, and hereby is, dismissed; and it is further ordered that the appellant do pay to the respondent his costs of this second appeal."

The Full Bench decided that

"where a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of such order; and it makes no difference that such second appeal was withdrawn by the appellant."

This case is very much like the one before us; though the second appeal was not disposed of on the merits, time for limitation was calculated from the date of the appellate order as it had the effect of finally disposing of the appeal. In my opinion what was laid down by their Lordships of the Privy Council in *Abdul Majid* v. *Jawahir Lal*[2] was only this: *viz.*, that in that case the order passed by their Lordships cannot be considered to be a judicial order passed on appeal because the appeal itself for the reason stated in their Lordships' judgment never came up for disposal by their Lordships and therefore the period of limitation should not be calculated from the date of the order passed in appeal within the meaning of Art. 183 of the Limitation Act. The other decision of the Privy Council reported in *Batuk Nath* v. *Munni Dei*[3] does not carry the matter much further. In that case as the appellant had not taken effectual steps for the prosecution of the appeal presented to His Majesty in Council the Registrar under R. 5 of the Order in Council dismissed the appeal for non-prosecution. It was held by their Lordships of the Privy Council that

" Such a dismissal for want of prosecution is not the final decree of an appellate Court within the meaning of Art. 179, cl. (2) of Sch. II of the Indian Limitation Act from which the period of limitation can be reckoned under that Article in support of the application for the execution of a decree."

The true scope of these two decisions of the Privy Council has been pointed out in *Raghu Prasad Singh* v. *Jadunandan Prasad Singh*[4]. See also the decision in *Gohur Bepari* v. *Ram-*

1. (1906) I. L. R. 30 Mad. 1: 16 M. L. J. 393 (F. B.).
2. (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P. C.).
3. (1914) L. R. 41 I. A. 104: I. L. R. 36 All. 284: 27 M. L. J. 1 (P. C.).
4. (1920) 6 Pat. L. J. 27.

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krishna Shaha[1]. It follows from what I have said above that the observations in *Abdul Majid* v. *Jawahir Lal*[2] relied on by the learned Counsel for the respondent should be strictly confined to cases where the appeals are dismissed for want of prosecution and should not be applied to a case like the one before us where the appeal was formally brought before the Court for disposal and was finally disposed of by an order dismissing it with costs. In such a case, in my opinion, the order of the lower appellate Court supersedes the order of the Court appealed against and time begins to run under Art. 181 from the date of the order passed in appeal. In *Venkayya* v. *Sathiraju*[3] it was held that an application for a final decree for sale under O. 34, R. 5, Civil Procedure Code, is governed by Art. 181 of the Limitation Act and the starting point, in cases where there has been an appeal from the preliminary decree is the date of the appellate decree whether the latter confirmed or varied the preliminary decree. I think the same should be the decision in the present case also, notwithstanding the fact that the appeal was withdrawn and dismissed without a consideration of the merits. In my opinion, the observations referred to in *Abdul Majid* v. *Jawahir Lal*[2] cannot be said to apply to a case like the one now under consideration.

In this connection the following observation of the learned Judges in *Sahu Nandlal Saran* v. *Sahu Dharam Kirti Saran*[4] may also be referred to with advantage. In that case it was held that " where an appellate decree either affirms, modifies or reverses the decree of the trial Court, the period of twelve years under S. 48 of the Code of Civil Procedure should begin from the date of the decree of the appellate Court, but where it has been held that no appeal lay, the order disposing of the so-called appeal will not amount to a decree and therefore the period of limitation, in such a case, should be counted from the date of the original decree and not from the date of the so-called appeal." After referring to the decisions of the Privy Council in *Abdul Majid* v. *Jawahir Lal*[2] and the decision in *Sachindra Nath Roy* v. *Maharaj Bahadur Singh*[5] and pointing

1. (1927) 46 C. L. J. 111.
2. (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P. C.).
3. (1921) I. L. R. 44 Mad. 714: 41 M. L. J. 117.
4. (1925) 24 A. L. J. 465.
5. (1921) L. R. 48 I. A. 335: I. L. R. 49 Cal. 203 (P. C.).

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out that the case before them was stronger "because in the Privy Council case an appeal did lie and had been properly preferred" while in the case before them no appeal lay at all and the proceedings did not terminate in an order dealing judicially with the matter in the suit the learned Judges observed as follows:—

"The converse proposition, though it is not necessary for us to decide this, would also seem to be in conformity with the spirit of S. 2, with the decision of their Lordships of the Privy Council and with Indian judicial authority, *viz.*, where an appeal lay and that appeal was disposed of by an order, that order will amount to a decree except as in the case dealt with by their Lordships of the Privy Council (a case of dismissal for default) and in other special cases where it is expressly declared by S. 2 that the order shall not amount to a decree."

For the above reasons I think it must be held that an order passed by a decree dismissing the appeal with costs notwithstanding the fact that the appeal was withdrawn by the appellant should be held to be an order finally disposing of the appeal superseding the order of the Court appealed against and that, for the purpose of the present case, time begins to run from the date of the order of the High Court and therefore, I. A. No. 36 of 1927, the application for passing of the final decree, is not barred by limitation. I would, therefore, allow the appeal with costs. The result is that the Petition will be disposed of by the Lower Court on the merits. The Court-fee on the Appeal Memo will be refunded.

Jackson,

Jackson, J.—The present point for determination is whether a mortgagee-decree-holder who obtained his preliminary decree on 12th December, 1921, is within time when applying for a final decree on 21st January, 1927, because an appeal against that preliminary decree was withdrawn and dismissed on 21st January, 1924. It is pleaded that the preliminary decree became merged in the appellate decree, upon the date of which the right to apply accrued, and therefore the application is within time.

Although under the Civil Procedure Code (O. 41, R. 5) an appeal shall not operate as a stay of proceedings under a decree, yet if there is an appeal against the preliminary decree there is no conclusive decree under which the decree-holder can proceed.

"The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties.

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When an appeal has been preferred, it is the decree of the appellate Court which is the [final] decree in the cause." Jowad Hussain *v.* Gendan Singh[1].

The "final" which I have bracketted means of course conclusive; it is not the antithesis of preliminary.

So far there is no difficulty; time runs from the appellate Court decree. But then the question has arisen: what if the appellate Court does not decree?

The Allahabad High Court attempted to get over this difficulty by ruling that whenever the appellate Court dismisses an appeal, it passes a decree. *Abdul Majid* v. *Jawahir Lal*[2]. But the special case under its consideration where the Privy Council had recommended His Majesty to dismiss the appeal for non-prosecution—was taken up on appeal to the Privy Council which pronounced as follows:—

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all . . . . there is no decree of His Majesty in Council in which the preliminary decree has become merged." *Abdul Majid* v. *Jawahir Lal*[3]

Then comes the question, is a dismissal upon withdrawal also a mere recognition that the appellant has not complied with requisite conditions, or is it a decree?

Although the withdrawal of an appeal is mentioned in O. 41, R. 22 (4) the Code nowhere lays down the procedure of the Court upon such withdrawal, and any consequent dismissal must presumably be under S. 151, Civil Procedure Code.

In Bombay it may not be the practice to dismiss; for in *Patloji* v. *Ganu*[4] the High Court appears simply to have permitted withdrawal; and such permission was held not to be a decree.

This ruling is considered by a Full Bench of our Court in *Peria Kovil Ramanuja Peria Jeeyangar* v. *Lakshmi Doss*[5], where it is held that time runs from the date of an order which has the effect of finally disposing of an appeal.

The Full Bench does not say whether in its opinion an order of dismissal consequent upon a withdrawal is a decree.

1. (1926) L. R. 53 I. A. 197: I. L. R. 6 Pat. 24: 51 M. L. J. 781 (P. C.).
2. (1910) I. L. R. 33 All. 154 (F. B.).
3. (1914) I. L. R. 36 All. 350: 27 M. L. J. 17 (P.C.).
4. (1890) I. L. R. 15 Bom. 370.
5. (1906) I. L. R. 30 Mad 1: 16 M. L. J. 393 (F. B.).

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The determining factor would seem to be whether or no the Court has in the terms of S. 2, Civil Procedure Code, "expressed an adjudication" or in the terms of the Privy Council ruling has "dealt judicially with the matter".

The exact order of dismissal runs thus: "The appeal is withdrawn. It is dismissed with costs. The costs will be proportionate to the interests of the 6th and 7th respondents who appear by counsel. . . ."

No doubt if the Court had been so disposed it might simply have recorded "Leave granted to withdraw," and then the appellant would be in the same position as if he had not appealed at all; but when the Court went further and considered the award and distribution of costs it is difficult to see how it has not expressed an adjudication and therefore passed a decree. How are the costs recoverable except under the decree of the High Court?

If the principle applicable to non-compliance of conditions is extended to withdrawal, it may lead to deplorable results.

A mortgagee obtains a preliminary decree, which becomes inconclusive by reason of an appeal being lodged. Then if preliminary conditions are not complied with, in all human probability, although the decree-holder is thrown back upon the original date of his decree, he will be within three years, and may not have much cause to complain that the unjustifiable action of his judgment-debtor in preferring an infructuous appeal has deprived him of several months to which the statute entitled him. But suppose the preliminary conditions are duly complied with, and the appeal comes on for hearing, and then the appellants withdraw. Then the decree-holder may find himself time-barred; for in these days an appeal may well be pending over three years. No doubt in such circumstances the Court might refuse withdrawal; but it is startling to consider that the perfectly normal and natural order of the Court "Withdrawn Dismissed. Costs to respondents" would have the effect of unsuiting the respondents as barred by limitation.

But apart from this *reductio ad absurdum*, in my opinion the order "Dismissed with costs" is a decree, and time runs from that order.

I should allow this appeal with costs to appellant.

S. R. —— *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Arumugam Pillai and another .. *Appellants** (*1st and 2nd defts.*)

v.

Khazi Mohideen Sheriff Sahib and another .. *Respondents in both the Appeals* (*Plaintiffs*).

Arumugam Pillai *v.* Khazi Mohideen Sheriff Sahib.

Limitation Act (IX of 1908), Arts. 134 and 144—Wakf property—Mutawalli having beneficial interest—Sale of endowed property—Suit by succeeding mutawalli to avoid—Starting point of limitation.

Where the mutawalli of a Mahomedan wakf, who has a beneficial interest in the endowed property, sells the property, the alienation is valid during the lifetime of the vendor, and a suit by a succeeding mutawalli for a declaration that the sale is invalid and for recovery of possession of the property sold is in time if instituted within twelve years from the date of the death of the mutawalli who sold the property.

Vidya Varuthi v. *Baluswami Aiyar,* (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.) and *Venkatasubbarayudu* v. *Haji Silar Sahib,* (1929) 58 M. L. J. 524, relied on.

Appeals against the decree of the District Court of Salem in O. S. No. 2 of 1924.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *E. Vinayaka Rao, L. A. Govindaraghava Aiyar* and *L. S. Veeraraghava Aiyar* for appellants.

S. Varadachariar and *S. S. Ramachandra Aiyar* for respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

Madhavan Nair, J.—A. S. Nos. 75 and 76 of 1927.—Both these appeals arise out of O. S. No. 2 of 1924 instituted by the plaintiffs, described as the mullas or trustees of a Muhammadan mosque at Paramathi. The suit is for the recovery of two items of property said to have been improperly alienated by the previous trustees. Appeal No. 75, in which the 1st defendant is the appellant, relates to item 1, the alienation of which was effected in his favour under three sale deeds, Exs. D, D (1) and D (2), dated 17th February, 1901, 19th April, 1901 and 3rd May, 1901, respectively. Item 2 was alienated in favour of the 2nd defendant, the appellant in A. S. No. 76, under two documents, Exs. E and E (1), dated 7th October, 1900 and 19th April, 1901, respectively. The present suit was instituted

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* Appeals Nos. 75 and 76 of 1927. 1st February, 1933.

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on 9th January, 1924. The main question in these appeals is whether the suit is barred by limitation under Art. 134 or Art. 144 of the Limitation Act. Art. 134 specifies 12 years as the period of limitation for a suit "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration" and the limitation period commences from the "date of the transfer". Art. 144 specifies 12 years as the period of limitation "for possession of immovable property or any interest therein not hereby otherwise specially provided for" and the period commences from the date "when the possession of the defendant becomes adverse to the plaintiff". The learned Judge held that the suit is not barred by limitation and decreed the plaintiffs' suit. The question of limitation is common to both the appeals. In Appeal No. 76 some subsidiary points also arise for consideration. We will, therefore, deal with these appeals separately.

A. S. No. 75 of 1927.—In considering which of the two Articles mentioned above applies to suits of this nature, it will be necessary, as may be seen from decided cases, first to consider the essential nature of the trust. But in this appeal the question of limitation may be disposed of on another consideration, though the nature of the trust will have to be inquired into, in the connected appeal, and what is stated in it on that question will well apply to this appeal also. Though the sales under Exhibits D and D (1) took place in 1901 according to the documents, it is admitted that the portions of item 1 dealt with under the documents were under prior encumbrances and possession of the items was obtained by the 1st defendant only in 1914. It has been held by a Full Bench of this Court in *Seeti Kutti* v. *Kunhi Pathummal*[1] that Art. 134 of the Limitation Act does not apply to a transfer from a trustee or mortgagee under which possession is not taken by the transferee. It follows therefore with respect to these alienations that the suit cannot be said to be barred either under Art. 134 or under Art. 144 also as it has been instituted before the expiry of 12 years from 1914. With regard to the alienation under Exhibit D (2), the learned Advocate-General says that possession was transferred on the date of the deed,

1. (1917) I. L. R. 40 Mad. 1040: 33 M. L. J. 320 (F. B.).

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3rd May, 1901. The respondents contend that in the case of this alienation also possession was not transferred on the date of the sale deed but was transferred only in 1914 as in the case of the other alienations. The sale of this item was also subject to an encumbrance as may be seen from the document. The sale deed no doubt says that the transferee was put in possession. Whether the prior encumbrance was a simple mortgage or a usufructuary mortgage, there is, we think, sufficient evidence in the case to show that possession with regard to this item was not obtained by the alienee before 1914. Exhibit I is the plaint in O. S. No. 45 of 1914, the scheme suit, by the decree in which predecessors of the present plaintiffs were removed and the present plaintiffs appointed. The present 1st defendant was the 23rd defendant in that suit. In paragraph 10 of the plaint in that suit the following statement occurs:—

> "The 23rd defendant Arumugam Pillai claims to have purchased the suit property in the said case. He has also filed a suit for the recovery of the said second item of property in the Court of the District Munsif of Namakkal and in O. S Nos. 347 and 367 of 1914."

The second item of property referred to in this statement is admitted to be the present first item. The 1st defendant did not evidently obtain possession of this portion of item 1 before 1914 as he instituted a suit to recover possession of item 1 in 1914. The written statement of the 1st defendant in the present suit also shows that he did not obtain possession of item 1 before 1914. In paragraph 6 he says:

> " The land mentioned in item 1 was in the possession of a usufructuary mortgagee and this defendant had to institute a suit for redemption in O. S. Nos. 364 of 1914 and 347 of 1914 on the file of the District Munsif's Court, Namakkal, and finally obtained possession through Court and has paid the vendors the other amounts mentioned in the sale deeds and he is therefore by right entitled to be in possession."

In his evidence given in this case as D. W. 1 there is nothing to show that he obtained possession of this portion of item 1 or of the other portions before 1914. Having regard to the 1st defendant's statement in his own written statement and the other evidence we have referred to, we do not think it is necessary to call upon the Lower Court to take fresh evidence and submit a finding as to when the 1st defendant came into possession of the property sold under Exhibit D (2). In our opinion it is established by the evidence that he did not obtain possession of the item before 1914. On this finding the suit is not barred with respect of this item also as in the case of

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the other portions of item 1 sold under Exs. D and D (1). Even if possession was obtained on the date of the deed it will be seen from the reasoning of our judgment in the connected Appeal No. 76 of 1927 which will equally apply to this case also, that the plaintiffs' suit is not barred. This appeal is therefore dismissed with costs.

A. S. No. 76 of 1927.—In this appeal the 2nd defendant is the appellant. Item 2 of the suit property had been alienated in his favour under two sale deeds, Exhibits E and E (1), dated 7th October, 1900 and 19th April, 1901, respectively. It is not disputed that the appellant got possession of the property on these dates. It is argued on his behalf that the institution to which this property belongs is a *bare* trust, that therefore Art. 134 applies to the case and that in any event the suit is barred by Art. 144 inasmuch as it has been admittedly instituted beyond 12 years from the date of the alienation. The respondents argue that having regard to the re[illegible] nature of the trust, Art. 134 does not apply to the case, and that the suit having been admittedly brought before the expiry of 12 years from the removal of the previous trustees, *i.e.*, the trustees who made the alienation, the suit is not barred. In this connection a very large number of cases, amongst which the following seem to be the most important, was brought to our notice: *Vidya Varuthi* v. *Balusami Aiyar*[1], *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[2], *Ranga Dasan* v. *Latchuma Dasan*[3], *Rama Reddy* v. *Ranga Dasan*[4], *Vellachami Naicker* v. *Alagarsami Naicker*[5], *Venkatasubbarayudu* v. *Haji Silar Sahib*[6], *Vadlamudi Sastrulu* v. *Thalluri Venkataseshayya*[7], *Periyanan Chetty* v. *Govinda Rao*[8], *Badri Narayan Singh* v. *Mahanth Kailash Giri*[9], *Debendra* v. *Naharmal*[10], *Naurangi Lal* v. *Ram Charan*[11], *Sarabdeo Bharthi* v. *Ram Bali*[12] and *Administrator-General of Bengal* v. *Balkissen Misser*[13]. We have considered each one of these cases, but

1. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).
2. (1923) L. R. 50 I. A. 295: I. L. R. 46 Mad. 751: 45 M. L. J. 588 (P. C.).
3. (1924) 48 M. L. J. 114.
4. (1925) I. L. R. 49 Mad. 543: 50 M. L. J. 589.
5. (1926) 104 I. C. 355.
6. (1929) 58 M. L. J. 524.
7. (1927) 110 I. C. 894.
8. (1931) 62 M. L. J. 496.
9. (1925) I. L. R. 5 Pat. 341.
10. A. I. R. 1930 Cal. 673.
11. A. I. R. 1930 Pat. 455.
12. (1932) I. L. R. 54 All. 909.
13. (1924) I. L. R. 51 Cal. 953.

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having regard to the trend of the decisions of this Court it will not be necessary to examine all of them in detail.

In considering whether Art. 134 applies or not, we have to examine whether the Muhammadan mosque to which the suit property belongs is a bare trust or whether the trustees have a beneficial interest in the trust. This distinction has been emphasized as a result of the decision of the Privy Council in *Vidya Varuthi* v. *Balusami Aiyar*[1] as understood in some of the subsequent decisions of this Court. In *Vidya Varuthi* v. *Balusami Aiyar*[1] it was held that Art. 134 of the Indian Limitation Act does not apply where the head of the mutt, having a beneficial interest in the mutt property, granted a permanent lease over a part of the mutt property not proved to be subject to a specific trust. It was also held in that case that except for unavoidable necessity the head of a mutt cannot create any interest in the mutt property to enure beyond his life, that a lessee however has not adverse possession under Art. 144 of the Limitation Act during the life of the head who granted the lease, and that if the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him and that there is no adverse possession until his death. On this ground it was held that the suit in that case was not barred under Art. 144 also. It is also clear from this decision that the rules enunciated in it apply to the endowments of Muhammadan religious institutions and to alienations made by *Sajjadanashins* or *Muttawallis*. The respondents argue that the case before us falls exactly within the scope of this decision, while the appellant contends that the present case is one of a bare trust in which the trustees have no beneficial interest, and that the alienation in the present case being a sale and not a lease as in the Privy Council case that decision is inapplicable and that the suit is barred by Art. 144 of the Limitation Act.

The first question for us to consider is, what is the nature of the trust in the present case? Is it one in which the property is endowed absolutely for the mosque or is it one in which the trustees have some beneficial interest? The evidence on the point is somewhat meagre, but such as it is, we think, it supports the respondents' contention that the trustees of the

1. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).

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mosque have a beneficial interest in the mosque property. In paragraph 4 of Exhibit I, the plaint in the scheme suit, it is stated that "these properties were granted rent-free by one of the former kings of Mysore during the latter part of the 18th century to one Khazi Muhammad Mohidin Sahib for the performance of the Kazi service and for offering and reciting prayers five times a day in the musjid etc.". In paragraph 5 it is stated that "after the death of the original grantee all his sons succeeded to the office of Kazi of the musjid and were discharging the duties appertaining to the office enjoying the endowments of the musjid". It is clear from these statements that the grantee of these properties and his family, after meeting the expenses involved in the performance of their duties, enjoyed the balance of the income from the properties for themselves. The grant of the property was made in the name of Mohidin Sahib and the property is held in various shares by the various *Muttawallis*. The evidence of P. W. 2 throws important light on this question. He says: "Before the sales the lands were in the possession of the trustees on behalf of the mosque. They were receiving the rent for themselves and looking after the mosque. They were getting 10 podies from the first item, 3 podies from the second item and Rs. 25 from the third item. To my knowledge they were getting that income from the lands for 60 years." This witness filed the inam title deeds and other documents in the prior suit. He conducted the appeal in the High Court. In his cross-examination he says, "I have seen the produce divided and the mullas taking their share home. It was the descendants of Khaji Muhammad Mohidin who were enjoying the produce. They told me in what shares they divided it." We think the evidence of this witness supports the respondents' contention that the profits accruing from the suit property after meeting the expenses of the services were being enjoyed by the trustees and that they have therefore a beneficial interest in the property. The plaintiffs alleged that the property belonged to them but abandoned this contention in the course of the suit. This does not by any means show that they have no beneficial interest in the property, an interest which is quite distinct from the absolute ownership claimed by them. The fact that a scheme suit under S. 92, Civil Procedure Code, was brought in connection with this mosque to remove the trustees does not neces-

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sarily show that the trust is a bare trust. The decision in *Nelliappa Achari* v. *Punnaivanam Achari*[1] shows that suits under S. 92, Civil Procedure Code, can be instituted against matadhipathis who admittedly have a beneficial interest in the mutt property. On the evidence before us we think we must accept the respondents' contention that the trustees of the mosque in this case have a beneficial interest in the endowed property. On this conclusion it must be held, following the Privy Council decision in *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[2], that Art. 134 will not apply to this case.

The next question is whether the suit is barred by Art. 144 of the Limitation Act. If no distinction is to be drawn between the grant of a lease and a sale, then the present case will clearly fall within the scope of the decision in *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[2]. In that case the alienation was a lease, whereas in the present case the alienations are sales. The learned Advocate-General has drawn our attention to two recent decisions of this Court, *Vadlamudi Sastrulu* v. *Thalluri Venkataseshayya*[3] and *Periyanan Chetty* v. *Govinda Rao*[4] where observations occur in support of his contention that if the alienations are sales, then a suit brought after the expiry of 12 years from the date of the alienations would be barred under Art. 144. But these observations can only be treated as mere *obiter dicta* having regard to the fact that the alienations in those cases related to leases (and not to sales) and the properties belonged to temples, the dharmakarthas having no beneficial interest in them. It is also a matter for observation that in those cases the suits were barred even if time is calculated from the death of the alienor. For instance, in *Periyanan Chetty* v. *Govinda Rao's* case[4], the lease was in 1865 and after the alienation, three or four Pandarasannadhis accepted rent and the suit was therefore clearly barred. The following observation of the learned Judges makes this point clear:

"Whether the proper date from which adverse possession generally runs in cases of permanent lease by dharmakarthas be taken as the date of the alienation or some subsequent date as the death of dharmakartha or his resignation or removal from office, we have no doubt that on the facts of this case adverse possession began from before 1902 and that the suits for possession were therefore barred under Art. 144."

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1 (1926) I. L. R. 50 Mad. 567: 52 M. L. J. 415.
2. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad 831: 41 M. L. J. 346 (P. C.).
4. (1931) 62 M. L. J. 496. 3. (1927) 110 I. C. 894.

In all these cases what was attempted to be argued was that on the death of a trustee a fresh cause of action to institute the suit accrues in favour of the succeeding trustee. This argument no doubt was rightly disallowed. But what is argued by Mr. Varadachari is not that each succeeding trustee gets a fresh cause of action to institute the suit to set aside the alienation at the time of his accession to the office, but that the alienor-trustee being disabled from questioning the validity of his own alienations, his successor is not so estopped and that he can before the expiry of 12 years from his accession to the office question the validity of the alienations. This seems to be the basis of the decision in *Vidya Varuthi* v. *Balusami Aiyar*[1] which held that the suit was not barred by Art. 144 in that case. It is not alleged in this case that the present suit has not been brought before the expiry of 12 years after the removal of the trustees who alienated the property. It appears to us that the present case both with regard to the application of Art. 134 and Art. 144 of the Limitation Act falls within the scope of the decision of the Privy Council in *Vidya Varuthi* v. *Balusami Aiyar*[1]. It has been conceded by the learned Advocate-General that if we hold that the Muttawallis have a beneficial interest in the suit properties, then he cannot distinguish the present case from the decision in *Vidya Varuthi* v. *Balusami Aiyar*[1]. In the view that we have indicated above it is clear that no distinction can be made between a lease and a sale with regard to the application of Art. 144 to cases like the present one. The argument that the decision in *Vidya Varuthi* v. *Balusami Aiyar*[1] should be confined to leases and not be extended to sales was attempted in *Ranga Dasan* v. *Latchuma Dasan*[2], but that argument was disallowed and this decision was confirmed in appeal in *Rama Reddy* v. *Ranga Dasan*[3]. No doubt the latter case has been dissented from in some respect in *Periyanan Chetty* v. *Govinda Rao*[4], but we have already pointed out that the observations in that case on the point under consideration are merely *obiter*. In *Venkatasubbarayudu* v. *Haji Silar Sahib*[5] it was held that a sale by the *Muttawalli* of wakf property, where the wakf provides for the private benefit of the family of the grantee as well as for the public benefit of a mosque, is valid

1. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P.C.).
2. (1924) 48 M.L.J. 114. 3. (1925) I.L.R. 49 Mad. 543: 50 M.L.J. 589.
4. (1931) 62 M. L. J. 496. 5. (1929) 58 M. L. J. 524.

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during the lifetime of the vendor, and a suit by the succeeding Muttawalli for a declaration that the sale is invalid and for recovery of possession of the property sold for the mosque is in time, if instituted within 12 years from the date of the death of the Muttawalli who sold the property. This decision followed the decision in *Vidya Varuthi* v. *Balusami Aiyar*[1] and specifically disallowed the distinction that was sought to be drawn between a lease and a sale of property by the Muttawalli with reference to Art. 144. The case before us, having regard to our finding that the Muttawallis have a beneficial interest in the endowed property, is on all fours with this case. It is true, that the Courts in other presidencies have taken a view different from the Madras view and have held that a distinction should be made between leases and sales in applying Art. 144 of the Limitation Act to alienations made by trustees. As the present case falls within the scope of the Privy Council decision in *Vidya Varuthi* v. *Balusami Aiyar*[1] and is covered directly by the decision of this Court in *Venkatasubbarayudu* v. *Haji Silar Sahib*[2] we do not think it is necessary to discuss any further the contention that Art. 144 should be applied to this case as the alienation we are concerned with is a sale and not a lease. We would, therefore, for the above reasons, hold that the plaintiffs' suit is not barred under Art. 144. We will state that what we have said in this appeal with regard to Art. 144 will apply to the other appeal also even if we assume in that appeal that the alienees obtained possession of the various items on the dates of sales.

The next question in this appeal relates to the value of improvements. This matter is dealt with by the learned Judge in paragraph 8 of his judgment. The evidence that improvements had been made by the appellant and that the value of the property has been increased thereby is extremely meagre. The 2nd defendant who says that improvements were effected did not go into the box as a witness and no accounts were filed to show that improvements were made. We agree with the conclusion arrived at by the learned Judge on this point.

The next point relates to the delivery of possession of the entire extent covered by the second item and the mesne profits decreed by the Court. It is said that the 2nd defendant is

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1. (1921) L. R. 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).
2. (1929) 58 M. L. J. 524.

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not in possession of more than three-fourths of an acre of the second item and that therefore the decree for the whole extent, with the entire mesne profits passed by the learned Judge should not be upheld. This argument cannot be accepted. The 2nd defendant may say that he is not in possession of more than three-fourths of an acre, but, as the learned Judge says, the plaintiffs' witnesses said that each of the defendants is in possession of the item which he purchased. Even his own witness D. W. 2 says that the 2nd defendant is in possession of about one acre. We accept the learned Judge's finding on this point, and also his finding as regards the mesne profits.

In the result the appeal is dismissed with costs.

B. V. V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ATKIN, LORD THANKERTON AND SIR JOHN WALLIS.

P. C.

Secretary of State for India in Council v. Subramania Aiyar.

The Secretary of State for India in Council, through the Collector of Tanjore .. *Appellant**

v.

S. Subramania Aiyar, Trustee of the Rameswaram Devasthanam .. *Respondent.*

Madras Irrigation Cess Act (Madras Act VII of 1865)—River belonging to or works constructed by the Government—Right to levy water-cess.

Under the Madras Irrigation Cess Act, 1865, as amended, the Government is not entitled to levy water-cess unless it is shown either that the river from which the water was derived for irrigation belonged to the Government (*i.e.*, that they, the Government, owned the whole bed of the river), or that the water was supplied from works constructed by the Government.

Secretary of State for India in Council v. *Sannidhiraju Subbarayudu*, (1931) L. R. 59 I. A. 56: I. L. R. 55 Mad. 268: 62 M. L. J. 213 (P. C.), followed.

Appeal No. 119 of 1931 from a judgment and decree, dated the 1st May, 1930, of the High Court, Madras, modifying a judgment and decree, dated the 15th April, 1925, of the Subordinate Judge of Tiruvalur.

The question for determination on the appeal was, whether the Government had a right under Madras Act VII of 1865 to levy any water-cess for the irrigation of the inam lands belonging to the plaintiff-Devasthanam.

Dunne, K. C. and *Wallach* for appellant.

De Gruyther, K. C. and *Narasimham* for respondent.

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*P. C. Appeal No. 119 of 1931. 20th February, 1933.

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20th February, 1933. Their Lordships' judgment was delivered by

LORD ATKIN.—This is an appeal from a decree of the High Court at Madras in a case in which the plaintiff, who is trustee of a temple, brought a suit for a declaration that the temple was entitled to free irrigation in respect of the village of Viranvayal in Madras.

The question depends upon the wording of the Madras Irrigation Cess Act of 1865 as amended. The substance of that is that, by S. 1 (*a*), whenever water is supplied or used for the purpose of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government, it shall be lawful for Government to levy a cess. There is a proviso as to *zamindars* or *inamdars* possessing rights which they may have got from previous engagements from Government. The village in question lies on the left bank of the river Korayar, and before the year 1890, which appears to be the first year that really comes into question in this case, there can be no doubt on the findings of the Court that the village was accustomed to be irrigated by drawing water from a channel which ran at about the northernmost part of the village. The river runs from west to east and just before reaching the village it takes a right-angled turn and begins to run almost due south. This village at this time and for some time before, exactly how long it is not known, had been drawing water from a channel which led to a tank from which the village lands were irrigated. At that time there was no protection in the nature of a river bank of any size on the left bank of the river, and in consequence the village lands, or a large portion of them, were liable to be flooded at flood time. In 1890, at the request apparently of the temple and at its expense, the Government built a bund or embankment running from the northernmost point south for some distance, which had the effect of keeping the flood water off the greater part of the village lands, still leaving some portion which would then be on the west side of the bank liable to be flooded. At that time the Government, also at the expense of the temple, had reconstructed the channel and executed masonry work so as to secure that there should be a permanent channel. That channel was conveyed by a tunnel or culvert through the bund, and between the bund and the river the Government inserted a sluice or sluices which would control the supply of water through the channel. In that way the village

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continued to be irrigated down to 1920, when a change was made in this respect, that a little below the intake into the channel they built a dam across the river with sluices in it which served to regulate the supply of water both immediately above and below the dam. That had the effect which the villagers had achieved before year by year by erecting temporary dams, and it had the effect of ensuring a reasonably constant supply of water into the intake of the channel at times when the river was flowing at its lowest ebb. The action was brought, as has been said, by the trustee of the temple for a declaration that the temple was not bound to pay cess. They had been paying cess for some ten or fifteen years, but they said they had paid it under a mistake as to their rights and they claimed repayment of the amount that they had paid. It is obvious that the amount which they were entitled to claim would be affected by the Limitation Act but as to that no question arises in this particular suit, the question being whether they ought to have paid it at all. The Government claim that they were liable to pay either because this was a river which belonged to the Government, or because the water was supplied from a work constructed by the Government, and it appears to their Lordships to be plain that the issues raised by the suit were of a narrow kind.

The first was as to whether this river from which the water was derived for irrigation belonged to the Government. That was a point which had been in controversy in principle for a considerable time in Madras. The facts in this case were that the temple authorities were riparian owners and that they owned the soil of the river *ad medium filum*. It has been finally decided by the judgment of this Board in the case of *Secretary of State for India in Council* v. *Sannidhiraju Subbarayudu*[1] that where the riparian owner owns the bed of the stream up to the *medium filum* the river could not be said to belong to the Government; in other words, if the Government sought to establish that the stream belonged to them, they would have to show that they owned the whole bed of the river. The claim of the Government to payment of cess therefore failed in that respect and was not contended for before their Lordships.

The other question that was raised was that this water was supplied from works constructed by the Government, and that

1. (1931) L. R. 59 I. A. 56: I. L. R. 55 Mad. 268: 62 M. L. J. 213 (P. C.).

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turns upon what the works constructed by the Government were which were relied upon in the written statement. It appears to their Lordships that the High Court took the correct view in that respect in coming to the conclusion that the only works which were relied upon at the trial before the Subordinate Judge, and the only works which were relied upon in the written statement and in respect of which issue was taken were the works which have been described in respect of this channel. The issue that was raised was whether the channel is recent and was constructed or maintained by the Government as alleged in paragraphs 5 and 6 of the written statement. The High Court have come to the conclusion that the claim was limited, as just stated. "The next question," says Mr. Justice Ramesam who delivered the judgment, "is whether the Government can levy the water-cess on account of the works they have constructed. They pleaded that the channel was constructed at their expense in the written statement. This question is now found in favour of the plaintiff." In fact, the High Court had sent down that issue for further hearing. The second Judge to whom the case was remitted had found that this channel had not been constructed by the Government, but that it had been constructed at the expense of the temple. Then Mr. Justice Ramesam goes on to say :

> "In appeal the learned Government Pleader attempted to argue that there are other works constructed by Government. In the first place the construction of these other works was not relied on by Government in the written statement, nor did the parties go to an issue on that matter."

Their Lordships are quite satisfied that that statement is correct and, being correct, it is quite impossible for them to entertain the further question that is now sought to be raised by the appellant and which their Lordships desire to make quite clear must be left open in a dispute between other parties.

Mr. Dunne suggests, first of all, that the fact that this river was the subject of an irrigation scheme and that the flow of water had been regulated by works, it might be up-stream or it might be down-stream so as to affect the flow of water below and to affect the plaintiff, would show that the plaintiff was taking water from works constructed by the Government. Their Lordships express no opinion about that.

Secondly, it was said that the particular work in question, the work of the regulator, the dam, which, as it has been said,

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was built just below the intake to the channel, was a work which affected the water which was being taken and that it might be said that the plaintiff took water from that work. That again in a similar case is a matter which will be open between the parties in that case; it cannot be open as between the parties to this appeal and their Lordships express no opinion about it. The pleadings have been on narrow issues which have been stated by the High Court, and such matters as have just been referred to were not open before them. Therefore, it follows that on the two issues that were open both have been decided against the Government and, therefore, it follows that the plaintiff was entitled to the relief granted to him.

In the result this appeal must be dismissed and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondent: *T. L. Wilson & Co.*

K. J. R. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Koppula Kotayya Naidu and others .. *Appellants** (*Defendants 1 to 3*)

v.

Chitrapu Mahalakshmamma .. *Respondent* (*Plaintiff*).

Kotayya Naidu v. Mahalakshmamma.

Benami—*Fraudulent conveyance of property—Fraud carried out—Suit by transferee for possession—Plea of* benami *by real owner—Estoppel.*

A person who has conveyed property *benami* to another for effecting a fraud cannot, where the fraud has been effected, set up the *benami* character of the transaction by way of defence in a suit by the transferee for possession under the conveyance, even though both the parties were privy to the fraud. The maxim "*in pari delicto potior est conditio possidentis*" has no application to the case; the test is that that party must fail who first has to allege the fraud in which he participated.

Kamayya v. *Mamayya*, (1916) 32 M. L. J. 484, followed.

Case-law referred to.

The advisability of legislative abolition of the *benami* system pointed out by Jackson, J.

Appeal against the decree of the District Court of Kistna at Masulipatam in O. S. No. 4 of 1926.

P. Somasundaram for appellants.

Ch. Raghava Rao for respondent.

* Appeal No. 7 of 1927. 25th January, 1933.

Kotayya Naidu *v.* Mahalakshmamma.

Madhavan Nair, J.

The Court delivered the following

JUDGMENTS. *Madhavan Nair, J.*—Defendants 1 to 3 (father and two sons) are the appellants. The suit property originally belonged to the 1st defendant and the 4th defendant had a mortgage over it. From the evidence it appears that a portion of it belonged to one Sitayya Naidu, another son of the 1st defendant, but no such distinction has been made in the suit and it is not necessary to refer to it any further. At a revenue sale on 8th May, 1918, the property was purchased by the 4th defendant for Rs. 762 in the name of his clerk. The case of the appellants is that this purchase by the 4th defendant was *benami* for themselves, the main object of the *benami* sale being to defeat an anticipated claim for partition from one Ranganayakulu Naidu, the son of the 1st defendant's brother. Though the property was sold, admittedly the appellants continued in possession; but according to the 4th defendant it was thenceforward as his tenants whereas the appellants contend that it was because the real title vested in them. Later on, 6 acres out of this property were sold by the 4th defendant to the 1st defendant's daughter Chittamma for Rs. 1000. The appellants allege that this sale was for the purpose of reimbursing Chittamma for the money which she lent for the purchase at the auction. Ranganayakulu brought a suit O. S. No. 42 of 1922 for partition and recovery of a half share of the family properties. That suit was directed against the present suit property and another 20 acres sold to one Chelamayya. In that suit the contention was raised by the plaintiff that the sale of the suit land to the 4th defendant was *benami*, but this was denied by the present defendants. After some evidence had been taken in the suit it was compromised on 25th January, 1924, as a result of which Ranganayakulu Naidu received 7 acres, 5 acres of which form portion of the suit property. Subsequently, on 5th August, 1924, the 4th defendant sold the remaining property to the plaintiff for Rs. 4,000 under the sale deed, Exhibit H, and the present suit was instituted by her for recovery of the property from the defendants.

The defendants denied that the 4th defendant had any title to the suit property as it was purchased by her *benami* for themselves. The plaintiff disputed the *benami* purchase contending that the 4th defendant purchased it for himself. It was also contended by the plaintiff that in the circumstances of the

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case it was not open to defendants 1 to 3 to raise the plea that the property was purchased *benami* by the 4th defendant. The second issue in the case related to these contentions. The learned District Judge upheld the contention of the appellants that the property was purchased *benami* for them by the 4th defendant, but he declined to give effect to this finding because he held that the 1st defendant defrauded Ranganayakulu of some portion of the suit property by setting up the false plea that the property belonged to the 4th defendant as a result of the auction purchase. Having been party to a plea of fraud which was successfully carried out, the learned Judge came to the conclusion that it was not open to the defendants to raise the contention that the purchase of property by the 4th defendant at the auction sale was *benami* for them. It was held in *Kamayya* v. *Mamayya*[1] that a person who has conveyed property *benami* to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set up the *benami* character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. Following this decision the learned Judge decreed the claim of the plaintiff.

On behalf of the appellants Mr. Somasundaram, accepting the finding that the purchase by the 4th defendant was *benami* for the appellants, argues that no fraud was committed by them in O. S. No. 42 by raising the plea that the 4th defendant became the owner of the land by the auction purchase, and that even if a fraud has been committed, since both the 4th defendant and the appellants were parties to the fraud, the Lower Court should have dismissed the plaintiff's suit. The latter argument raises the question whether *Kamayya* v. *Mamayya*[1] was correctly decided. Mr. Raghava Rao, on behalf of the respondent, besides supporting the judgment of the Lower Court on the ground on which it is based, argues further that the learned Judge should have held that the purchase by the 4th defendant at the revenue sale was not *benami* for the appellants but it was for himself. Thus the points arising for consideration in this appeal are (1) whether the purchase of the suit property at the revenue auction by the 4th defendant was *benami* for the appellants; (2) whether by raising the plea that the property

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1. (1916) 32 M. L. J. 484.

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was sold to the 4th defendant at the revenue sale the defendants as a matter of fact defrauded Ranganayakulu, the plaintiff in O. S. No. 42 of 1922; and (3) whether in the event of our upholding the findings of the District Judge, effect should not be given to the decision in *Kamayya* v. *Mamayya*[1].

Point 1. On this point, as already stated, the learned District Judge after a very detailed and careful consideration of the entire evidence came to the conclusion that the purchase of the property by the 4th defendant was *benami* for the 1st defendant. We see no reason to differ from his conclusion. The reasons which persuaded him to hold that the purchase was *benami* are summarised in paragraph 15. The 1st defendant had strong motive to bring about a *benami* sale, for he wanted to prevent his relative Ranganayakulu from claiming a share in the property. It is true that the 1st defendant's case that his daughter Chittamma supplied Rs. 800 to the 4th defendant for buying the property for which afterwards a portion of it was sold to her, has not been satisfactorily made out; but having regard to Exs. I and I (*a*), and the other evidence in the case, this failure cannot be treated as fatal to the *benami* claim urged on his behalf. Exs. I and I (*a*) are extracts from the 4th defendant's account supplied to the 1st defendant by his clerk. The 4th defendant says that he did not authorise his clerk to furnish these accounts to the 1st defendant, but this story has been rightly disbelieved by the learned District Judge. These extracts show that though the 4th defendant provided the money for the purchase he debited it against the defendants, and, as the District Judge says, "it appears impossible to explain why he should have done this if he had been buying the lands on his own account". These accounts also show that though the 4th defendant is alleged to have purchased the property for himself, the money due to him on the outstanding mortgage is still kept as a continuing debt. There is a considerable body of evidence to show that the 1st defendant took active part in bringing about the sale in favour of the 4th defendant, that the intending bidders were persuaded to make no bids so that the property may be knocked down in favour of the 4th defendant for a nominal price and, as it happened, he succeeded in buying it for a ridiculously small price. The learned Judge finds that the present value of

1. (1916) 32 M. L. J. 484.

the property would be about Rs. 13,500. Even assuming that the property had doubled in value since the purchase, and even if we add the mortgage amount together with interest due to the 4th defendant in estimating its true value from his standpoint, the price actually paid, Rs. 762, is ridiculously small. The impression that the property must have been purchased *benami* gains in strength when we consider the evidence with regard to the actual possession. It is undisputed that the 1st defendant was in possession of the property. The 4th defendant's case is that he was in possession as his tenant. An oral lease in support of his possession is set up by the 4th defendant. The only oral evidence adduced by the 4th defendant in support of this part of his case is that of himself. The entries in his account do not necessarily show that the paddy said to have been delivered by the defendants relate to the landlord's share of this property, for the 4th defendant had his own business and a commission shop run by one of his sons, and the delivery of the paddy might have been, as the defendants say, for sale by him. And to complicate the situation there is a relationship of creditor and debtor also between the parties. As the learned Judge says, "these accounts are compatible with either view of the case". Then there is the circumstance that the 4th defendant knows nothing of this property, that a tank on it was dug at a cost of Rs. 100 by the 1st defendant; and there is satisfactory evidence that a portion of the property, under an acre, was exchanged by the 1st defendant with one Papigadu (*see* the evidence of D. W. 4 and Exhibit D). It is hardly likely that the 4th defendant would have allowed these transactions to take place if he had purchased the property for himself. Considering the evidence as a whole, we are unable to agree with the respondent's contention that the 4th defendant must have purchased the property for himself.

Point 2. On this point also we must accept the learned Judge's conclusion. In his written statement as well as in his evidence the 1st defendant has clearly stated that the motive for bringing about an ostensible sale of the property in favour of the 4th defendant was to prevent Ranganayakulu from claiming a portion of the property. Though he knew that the sale of the property was *benami* to the 4th defendant, when Ranganayakulu claimed a half share in it in O. S. No. 42 of 1922, the defendants pleaded that the sale in favour of the 4th defendant was

a genuine sale and not a *benami* one. Their object clearly was to deprive Ranganayakulu from getting his due share. In his evidence as D. W. 4, the 1st defendant distinctly says "I expected Ranganayakulu Naidu to sue me for partition and my son Seethayya Naidu was then leading a bad life. So, I got the 4th defendant to buy the property". In another portion of his evidence he makes the untruth of his plea very clear. He says "I denied the *benami* nature of the transaction with 4th defendant. In para. 11 I stated that the sales to defendants 5, 6 and 7 in that suit were real transactions and not *benami* for defendants 1 to 4 . . . . . That statement was false. I then stated that the suit lands were not in my possession. That is untrue." It will be remembered that Ranganayakulu claimed 20 acres for his share in O. S. No. 42 of 1922 and he compromised the suit by getting for himself only 7 acres, of which 5 acres formed a portion of the suit property. Mr. Somasundaram on behalf of the appellants contends that Ranganayakulu must have compromised the suit because of the difficulty that he must have found in proving that the sale was *benami* and so he must have thought that instead of spending unnecessarily money on the litigation to prove a difficult claim the best policy was to accept what he must have thought was an adequate share and thus end the litigation. The evidence is not satisfactory to establish this contention. There is some evidence that towards the end of the case the 1st defendant refused to sign the compromise saying that the lands were in the name of the 4th defendant and that he did not like to give the plaintiff any share in it. There is also his evidence that he told the Subordinate Judge that the purchase was *benami* in the name of the 4th defendant and at that time Ranganayakulu was in Court; but this statement is not corroborated by any other evidence. Assuming as the learned Judge has found (*see* para. 14) that the 1st defendant made a declaration towards the close of the suit that the 4th defendant was only his *benamidar*, the evidence does not show that the plaintiff accepted the compromise in spite of this declaration. We cannot say what would have been the exact extent decreed to Ranganayakulu in the absence of the false claim set up by the 4th defendant; but it is a fact that he set up a false claim intending to defraud Ranganayakulu and that the latter had to accept by way of compromise a good deal less than what he claimed in the suit.

Kotayya Naidu v. Mahalakshmamma.

Madhavan Nair, J.

On the whole, we agree with the learned Judge that the plea of the 1st defendant in O. S. No. 42 of 1922 was intended to defraud the plaintiff in that suit and he was without doubt defrauded.

Point 3. The next question is whether it is open to the defendants to plead their own fraud as a defence to the present action. The plaintiff as having purchased the property from the 4th defendant may be treated as being in the same position as the 4th defendant for deciding this point. Mr. Somasundaram argues that the appellants and the 4th defendant having been parties to a fraud which has been carried out, the maxim *in pari delicto potior est conditio possidentis* will apply and that the plaintiff's suit should be dismissed. But in *Kamayya* v. *Mamayya*[1] it has been held that even though the plaintiff may have been a party to the fraud the defendant will not be permitted to plead his own fraud as a defence to an action against him. The test given in the case is that that party must fail who first has to allege the fraud in which he participated. It is clear if we apply this test in this case the appellants must fail. The appellants argue that the decision in *Kamayya* v. *Mamayya*[1] is wrong, that it has not been approved of in other Courts and that before deciding this case we must take the opinion of a Full Bench on the question whether *Kamayya* v. *Mamayya*[1] has been correctly decided. In this connection our attention has been invited to the very recent decision in *Qadir Bakhsh* v. *Hakam*[2]. As may be seen from that judgment, the law seems to have been differently construed in other Courts. But so far as our own Court is concerned, the decision in *Kamayya* v. *Mamayya*[1] has been consistently followed in a series of decisions. *Kamayya* v. *Mamayya*[1] was a decision by Sir John Wallis, C. J. and Coutts-Trotter, J., as he then was. This decision was followed by Sir Walter Schwabe, C. J. and Coutts-Trotter, J., in *Parthasarathy Reddiar* v. *Kandasami Mudaliar*[3] and was again followed in *Ramasami Naicker* v. *Alamelu Ammal*[4] by Coutts-Trotter and Ramesam, JJ. *Pachayammal* v. *Devanaiammal*[5] is the next decision of this Court where *Kamayya* v. *Mamayya*[1] was followed by Waller, J. This decision is interesting as in it the view now urged by Mr. Somasundaram

1. (1916) 32 M. L. J. 484. 2. (1932) I. L. R. 13 Lah. 713 (F.B.).
3. (1923) 45 M. L. J. 161. 4. (1923) 46 M. L. J. 298.
5. (1925) 22 L. W. 313.

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was specifically put before the learned Judge and the Calcutta decision in *Raghupati* v. *Nrishinga Hari Das*[1] in support of it was also brought to his notice. The Lahore case had not then been decided. Though he was aware that there was a considerable body of authority in favour of the view that the defendant is entitled to show the real nature of the transaction as against a confederate in the fraud, the learned Judge still preferred to follow the decision in *Kamayya* v. *Mamayya*[2], as in his view the principle embodied in that decision was more effective in minimising fraud than the other view. In this connection attention may be drawn to the following observations:

> "The question is one of public policy, and I think that public policy will be best served, by following the rule that a man should not be allowed to plead his own fraud. As Sir Lawrence Jenkins showed in the Bombay case, it is the rule which 'will be most apt to deter persons from frauds of this kind'. It is the fraudulent grantor, who expects to extract the entire, or the main benefit from the fraud. And if he realised that the law will give him neither a remedy nor a defence against his confederate, the temptation to commit the fraud will be minimised."

The decision in *Kamayya* v. *Mamayya*[2] by the then Chief Justice and himself was followed by Coutts-Trotter, J., after he became Chief Justice in *Subbaraya Chetty* v. *Subbaraya Chetty*[3]. *Palepu Narayanamurthi* v. *Komali Chandrayya*[4] by Waller, J., is the latest decision of this Court on this point. In that case also *Kamayya* v. *Mamayya*[2] was followed. Having regard to this strong current of authority in our Court in support of the decision in *Kamayya* v. *Mamayya*[2] and the absence of any conflict of views, we do not think we will be justified in referring it for a fresh consideration before a Full Bench. Following *Kamayya* v. *Mamayya*[2] we would therefore hold that in the circumstances of the case it is not open to the appellants to plead their own fraud as a defence to the plaintiff's suit.

The appeal therefore fails and must be dismissed with costs. The Government will be entitled to realise their costs from the appellant. The memorandum of objections is for costs only. It is dismissed with costs.

Jackson, J.

Jackson, J.—I agree that there should be no departure from the rule of law set forth so clearly in *Kamayya* v. *Mamayya*[1].

1. (1922) 36 C. L. J. 491.
2. (1916) 32 M. L. J. 484.
3. (1926) 24 L. W. 500.
4. (1927) 26 L. W. 67.

Kotayya Naidu v. Mahalakshmamma.

Jackson, J.

This may involve some divergence from the law as understood in Northern India, but the Madras practice in my opinion accords with what should be the public policy of this Presidency. In fact so far from extending the scope of *benamidars*, by allowing them first to cheat their victim and then come again into Court with the story that the previous case was false, I should prefer to see *benami* transactions altogether forbidden, and I consider that this Presidency, whatever may be the condition of the less literate parts of India, is now ripe for such legislative action. The treatment of this question by the Civil Justice Committee of 1924-25 was most unfortunate. All the members of the Committee were agreed as to the evils of the *benami* system, which it denounced in terms both forcible and true. But three of the members considered that the proposed legislation (preventing any plea short of fraud that the documentary evidence of title is a sham) should not be introduced unless it resulted in the abandonment of the practice within a reasonably short time. Apparently the dissident members envisaged Indians still putting property under fictitious titles and pleading that they had never heard of the new law. Such a fear would be quite groundless in this Presidency, and if that fear were removed, the Committee was prepared unanimously to recommend the abolition of *benami* transactions. It is unnecessary to detail the advantages of such a measure which are fully set forth in the Committee's report. But apart from the resultant benefits to public morality—restricted scope for perjury when registered documents are regarded as conclusive evidence—restraint upon excessive borrowing in the hope of concealing assets, and restraint upon inordinate rates of interest in the knowledge that assets may be concealed, there is a practical advantage which in these times cannot be ignored. Under the present system a greater number of suits is being admitted than can possibly be decided within a reasonable time; and financial stringency precludes the increase of Courts. The remedy must therefore lie in restricting the field of litigation, and that can best be done by making the creation, assignment or extinction of title still more dependent upon registered documents to the exclusion of oral evidence.

S. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Bava Sahib Miyan .. *Appellant* (Plaintiff)*

v.

Abdul Ghani Sahib and others .. *Respondents (Defendants 1 to 12 and 14 to 16).*

Bava Sahib Miyan v. Abdul Ghani Sahib.

Civil Procedure Code (V of 1908), O. 33, R. 1 and O. 7, R. 11—Suit filed with Court-fee—Direction by Court for payment of additional Court-fee—Continuation of suit as pauper—Permissibility—Application made on date fixed for payment of further Court-fee—Suit whether stands rejected.

The plaintiff, who sued for the recovery of certain properties, valued the suit at a certain amount and paid Court-fee thereon. Subsequently on objection being taken to the valuation by the defendants the Court directed the plaintiff to pay on the 18th January, 1926, a further sum by way of additional Court-fee. The plaintiff was unable to pay the additional Court-fee as ordered and applied on the date fixed for payment for leave to continue the appeal as pauper.

Held, that the Court might allow the plaintiff to continue the suit as pauper even though when he instituted it he had paid Court-fee on it.

Meaning of the word "instituted" in O. 33, R. 1, Civil Procedure Code, considered.

Subba Rao v. *Venkataratnam,* (1929) I. L. R. 53 Mad. 43 : 57 M. L. J. 677, relied on.

Held, further, that the application to continue the suit as pauper having been made by the plaintiff before the expiry of the period fixed for payment of the additional Court-fee, the plaint should not be considered to stand rejected under O. 7, R. 11 of the Code.

Sabitri Thakurain v. *Savi,* (1921) L. R. 48 I. A. 76 : I. L. R. 48 Cal. 481 : 40 M. L. J. 308 (P. C.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in I. A. No. 10 of 1926 in O. S. No. 25 of 1925.

C. S. Venkatachariar for appellant

S. Nagaraja Aiyar and *V. Krishnamachariar* for respondents.

The Court delivered the following

Madhavan Nair, J.

JUDGMENTS. *Madhavan Nair, J.*—In this case the plaintiff-appellant sued for the recovery of possession of certain trust properties. He valued the suit at Rs. 3,030 but objections being taken by the defendants to the valuation an issue was raised on the point and it was found that the properties were worth Rs. 14,000. When he first instituted the suit he had paid Court-fee on Rs. 3,030 but when it was found that the

* Appeal No. 298 of 1926. 3rd January, 1933.

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properties were valued at Rs. 14,000 he was asked to pay additional Court-fee on the 18th January, 1926. This order was passed on the 23rd December, 1925. As the appellant was not able to pay the Court-fee as ordered on the 18th January, 1926, he put in an application asking the Court to allow him to continue the suit as pauper. This application was opposed on two grounds. It was argued that the suit having been filed after the payment of Court-fee it was not open to the appellant to continue it as pauper. It was also argued that the appellant not having paid the Court-fee on the 18th January, 1926, as directed, the plaint should have been considered to have been rejected under O. 7, R. 11 (*b*) and (*c*), Civil Procedure Code and that there was no plaint which could be proceeded with by the appellant as a pauper. Both these arguments were accepted by the learned Subordinate Judge and his petition was rejected. In this appeal, it is contended that the Lower Court is wrong on both the points.

It has been held in a series of decisions under the old Code that it is open to a party who had filed a suit paying Court-fee to continue it as a pauper. In this Court it was held in *Subba Rao* v. *Venkataratnam*[1] following these decisions that under the new Code also the plaintiff may be allowed to continue the suit as a pauper though when he instituted he had paid Court-fee on it. The appellant relies on this decision in support of his contention that the plaintiff should be allowed to prosecute the suit as pauper.

On behalf of the respondent it is contended that this decision should not be accepted as laying down the correct law inasmuch as it does not appear from the judgment that the learned Judges have considered the alteration in the wording of O. 33, R. 1 of the new Code. Under the old Code in S. 401, which corresponds to O. 33, R. 1 the word used was "brought" instead of the word "instituted" used in the present Code in O. 33, R. 1. S. 401 in the old Code ran as follows:—

> " Subject to the following provisions any suit may be *brought* by a pauper."

O. 33, R. 1 says:

> " Subject to the following provisions any suit may be *instituted* by a pauper."

1. (1929) I. L. R. 53 Mad. 43: 57 M. L. J. 677.

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It is argued that since the word "instituted" is substituted for the word "brought" the legislature intended that permission to sue as pauper must be asked for at the time when the suit was instituted and it could not be granted after the suit was filed on payment of Court-fee. We do not think that the legislature intended to introduce any alteration in the law by the substitution of the word "instituted" in the place of the word "brought". The rule only means that the pauper must have instituted the suit and not that the plaintiff should have been a pauper at the time when he filed the suit. Though the alteration in the language has not been specifically referred to in *Subba Rao* v. *Venkataratnam*[1] the law laid down in that decision may be accepted as the correct law. In our opinion therefore it is open to the appellant to ask the Court to allow him to continue the suit as pauper.

The next point is whether the plaintiff not having paid the Court-fee on the 18th January, 1926, as directed by the Court, the plaint should be considered to stand rejected. The learned Judge held that the plaint should be considered to be rejected on the strength of the Privy Council decision reported in *Sabitri Thakurain* v. *Savi*[2]. But that case is clearly distinguishable from the present one having regard to its facts. In that case the appellant was asked on the 18th December, 1914, to give security for costs within two months from that date. Security given on the 17th February, 1915, being rejected as insufficient the appellant filed a petition on the same day for three months' further time; this petition came before the Court on the 18th February, and it was refused. Under O. 41, R. 10 (2) of the Civil Procedure Code "Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal". The security not having been given the result was that the appeal stood rejected. On the 22nd February the respondent filed an application for taxed costs and praying that the appeal may be dismissed. Upon this for the first time the appellant sought permission to proceed in *forma pauperis* and an application for the same was filed on the 23rd March. The question was whether the permission asked for should be granted or not. The High Court of Calcutta declined to grant the permission and this order was confirmed

1. (1929) I. L. R. 53 Mad. 43: 57 M. L. J. 677.
2. (1921) L. R. 48 I. A. 76: I. L. R. 48 Cal. 481: 40 M. L. J. 308 (P. C.).

by the Privy Council. Now, their Lordships of the Privy Council said:

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> "The High Court at Calcutta rightly conceived itself precluded from entertaining the appellant's application to be allowed to continue her appeal in *forma pauperis*; since to grant her application at that stage would in effect have been to keep alive an appeal which they were, by reason of her default in the matters of security, bound to reject."

From these facts it is obvious that the Privy Council decision cannot be applied to the facts of the present case. The appeal had already stood rejected in *Sabitri Thakurain* v. *Savi*[1] when the application asking for permission to continue the suit as pauper was made by the petitioner; whereas in the present case the suit had not been rejected nor could it have been rejected before the 18th January, 1926, by which date the plaintiff was asked to pay additional Court-fee and on the 18th, he made his application for permission to sue as a pauper. We are of opinion therefore that the decision of the learned Judge on this point also cannot be upheld.

This appeal was filed by the appellant as a pauper and enquiry was made by the Lower Court at the instance of this Court after giving notice to the respondent and the Government Pleader regarding the pauperism of the appellant, and it was found that he was a pauper and permission was therefore granted to him to prosecute the appeal as a pauper. In these circumstances we do not think it is necessary now to hold a fresh enquiry whether the appellant is a pauper or not; and further, the respondent under O. 33, R. 9 has a right to dispauper the petitioner if he thinks he can make out a case.

As we differ from the opinion of the learned Judge on both the points on which he has dismissed the application we set aside the decision of the Lower Court and give permission to the plaintiff to continue the suit as pauper. The case will be restored to file by the learned Subordinate Judge and he will proceed with it in due course of law. No Court-fee is payable to Government. The costs of this appeal will abide the result.

Jackson, J.

Jackson, J.—I agree. The word "instituted" in O. 33, R. 1, Civil Procedure Code, does not emphasize that the pauper must take action only at the beginning of the proceedings but rather the pauper must be the institutor or the founder of the suit.

B. V. V. *Case remanded.*

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1. (1921) L. R. 48 I. A. 76; I. L. R. 48 Cal. 481; 40 M. L. J. 308 (P. C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PAKENHAM WALSH.

N. M. Kadir Meera Saheb Taraganar .. *Appellant* (Petitioner—Transferee Plaintiff)*

v.

N. M. Pir Mahomed Taraganar and others. .. *Respondents (Respondents—Plaintiffs and Defendants).*

Kadir Meera Saheb Taraganar *v.* Pir Mahomed Taraganar.

Civil Procedure Code (V of 1908), O. 21, Rr. 1 and 16—Execution of decree—Pending proceedings, application by decree-holder to record satisfaction in full—Subsequent assignment by decree-holder's power-of-attorney agent of the decrees in favour of third person—Objection by third person to the application of decree-holder to record satisfaction—Whether maintainable—Whether it is open to Court to go into the question whether satisfaction was intended to defeat or defraud third person not a party to the suit.

It is expressly stated in O. 21, R. 1 of the Civil Procedure Code that the judgment-debtor making payment shall do it in one of these three ways (1) into Court whose duty it is to execute the decree, (2) out of Court to the decree-holder, or (3) otherwise as the Court which makes the decree directs. There is absolutely no provision here for judgment-debtor paying a third party merely because he happens to know of the assignment of the decree in the latter's favour by the decree-holder; and it is perfectly clear that if he were to make such payment, he would run the risk of having to pay money over again to the decree-holder.

Where a power-of-attorney agent conducted a mortgage suit on behalf of his principal and got a decree and pending proceedings for sale of mortgaged properties the principal put in applications stating the decree amounts had been paid in full satisfaction but subsequently the agent assigned the decrees to a third person, the appellant, who put in an application under O. 21, R. 16 of the Civil Procedure Code to permit him, after recognising the assignments, to oppose the applications to enter up satisfaction,

Held, that as regards the satisfaction of the decree which the decree-holder asked the Court to record, it was not open to the Court to go into the question whether this satisfaction was intended to defraud or defeat the rights of some third party who was not before it as a party to the suit to whom the decree-holder was alleged to have assigned his interest under the decree. That matter must obviously be agitated in a separate suit.

Appeals against the appellate order of the District Court of Tinnevelly, dated the 13th July, 1931 and made in A. S. Nos. 229 and 230 of 1930 preferred against the order of the Court of the District Munsif of Palamcottah, dated the 26th July, 1930 and made in E. Ps. Nos. 240 and 245 of 1930 in O. S. Nos. 76 and 77 of 1928.

C. S. Venkatachariar for appellant.

K. V. Sesha Aiyangar for respondents.

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*C. M. S. As. Nos. 244 to 247 of 1931. 20th January, 1933.

Kadir Meera Saheb Taraganar *v.* Pir Mahomed Taraganar.

The Court delivered the following

JUDGMENT.—One Pir Mahomed Taraganar executed a power-of-attorney in favour of one N. K. Mahomed Moideen Taraganar to conduct certain suits for him and realize the money. As the latter had advanced him money, and moneys realized by the agent were made a sort of charge for payment of the debt, and the power-of-attorney was not to be cancelled until the dues had been settled, the agent brought suits on the two mortgage deeds on behalf of the principal and obtained decrees. Pending proceedings for sale of the mortgaged properties, the decree-holder put in applications stating that the decree amounts had been paid in full and satisfaction might be entered. His applications to enter up satisfaction were put in on 18th March, 1930. On 27th March, 1930, the agent assigned the decrees to one Kadir Meera Saheb, the appellant in these proceedings. The appellant put in an application under O. 21, R. 16 to permit him, after recognizing his assignments, to oppose the applications to enter up satisfaction as they were collusive documents. These two petitions filed under O. 21, R. 16 were dismissed both by the original appellate Courts and the petition to record satisfaction of the decrees was allowed by both Courts. Against these orders the present appeals are filed.

The learned District Judge held that neither the question whether the appellant was the assignee-decree-holder nor the question whether the entering up of satisfaction of the decrees was collusive or not could be gone into by the executing Court, because it was not a matter between the parties to the suit. On the first point there seems to be a conflict of authorities. I do not think, in the view which I take on the second point, that there is any necessity to discuss it, because I am perfectly clear that the application to execute the decrees cannot be gran because satisfaction of the decrees has been recorded argument raised for the appellant is that the judgm knew of the assignments of the decrees by the under power-of-attorney to the agent and th fore not entitled to make any payment to th may note in passing that there is no power-of-attorney that the agent has However, as the learned Distric ment, that it was not contro

Kadir Meera Saheb Taraganar *v.* Pir Mahomed Taraganar.

to the agent to assign decrees, I will discuss the matter on the assumption that the agent had this power. O. 21, R. 1 states only three ways in which the judgment-debtor may make payment. It is expressly stated that it shall be in one of these three ways (*a*) into the Court whose duty it is to execute the decree, or (*b*) out of Court to the decree-holder, or (*c*) otherwise as the Court which makes the decree directs. There is absolutely no provision here for the judgment-debtor paying a third party merely because he happens to know of the assignment of the decree in the latter's favour by the decree-holder; and it is perfectly clear that if he were to make such payment, he would run the risk of having to pay money over again to the decree-holder. He cannot be asked to involve himself in disputes between the decree-holder and somebody to whom the former has assigned the decree. O. 21, R. 16 definitely provides that the judgment-debtor shall have notice before the assignee-decree-holder is permitted by the Court to execute the decree, and he is entitled to raise objections. On the view urged by the appellant he will be shut out of his right completely. The decree-holder has only got to send a notice that he has assigned the decree and even if apparently he has already satisfied the decree, the judgment-debtor is bound to pay the assignee and not the decree-holder. He cannot object to the assignment because he has no *locus standi* until the decree-holder applies under O. 21, R. 16, for permission to execute the decree. This means that the judgment-debtor either has to make payment to a person not authorised by the Court or to refrain from discharging the decree at all until the assignee-decree-holder asks for permission to execute the decree. It is needless to say that there is absolutely no authority for this proposition. As regards the satisfaction [illegible] the decree which the decree-holder asks the Court to record, [illegible] not open to the Court to go into the question whether this [illegible]tion was intended to defraud or defeat the rights of [illegible] party who is not before it as a party to the suit, to [illegible]ee-holder is alleged to have assigned his interest [illegible] That matter must obviously be agitated in a [illegible] result the orders of the Lower Court are [illegible]als should be dismissed with costs in [illegible] no costs in other appeals.

Appeals dismissed.

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